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IN THE

SUPREME COURT OF THE UNITED STATES

CAPITAL CASE
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ORIGINAL

ROBERT WAYNE SAWYER,
PETITIONER

VERSUS

JOHN P. WHITNEY, WARDEN, LOUISIANA STATE PENITENTIARY
RESPONDENT

* * * * *

STATE OF LOUISIANA'S RESPONSE IN OPPOSITION TO STAY OF EXECUTION, AND WRIT OF CERTIORARI OF SECOND WRIT OF HABEAS CORPUS

* * * * *

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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All Respondents

REASONS FOR NOT GRANTING WRIT

The issues in this case do not provide this Court with a basis for granting a writ of certiorari. The panel opinion from the Court of Appeal for the Fifth Circuit is consistent with the opinion from the Eleventh Circuit, Johnson v. Singletary, 938 Fd.2d 1166 (11 Cir. 1991) (en banc) and does not conflict with the opinions rendered by the Eighth Circuit, Stokes v. Armontrout, 893 Fd.2d 152 (8th Cir. 1990), and Ninth Circuit, Deutscher v. Whitley, 1991 Lexis 23717 (9 Cir. October 15, 1991), but merely limits the application of those opinions. The Fifth Circuit carefully developed a definition of "actual innocence of the death penalty" that a Petitioner is not actually innocent of the death penalty unless he demonstrates under all the evidence that was and arguably should have been presented that the jury would not have been authorized to sentence him to death. See, Sawyer v. Whitley, (slip opinion October 10, 1991, page 17.) In developing the sentencing phase test the court looked at Kuhlman v. Wilson, 106 S.Ct. 2616 (1986) in which the plurality focused on whether the Petitioner had shown a fair probability that, in light of all the evidence, the trier of fact would have entertained a reasonable doubt as to his guilt. Because Jackson v. Virginia was at the foundation of the Kulhman test, and carefully limited the role of court in conducting a sufficiency of evidence review so as not to impinge on the jury discretion, the Fifth Circuit limited its test of a claim of actual innocence of a capital sentence to only those facts which provide the predicate for the jury's authority to assess the death penalty.

This definition is not in conflict with the definition from the Eighth and Ninth Circuits but merely limits of their definition. The Eighth Circuit established that "in the penalty phase context, this exception will be available if the Federal Constitution error alleged probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life imprisonment. Stokes v. Armontrout, supra. The Fifth Circuit definition does not conflict with the Eighth Circuit's but merely limits the inquiry, so as not to impinge on the discretion of the jury, to those facts that

would support the eligibility for the death penalty.

Furthermore, the definition does not conflict with the Ninth Circuit test which requires a showing that Constitutional error affected the sentencing process to such a degree that it is more probable than not that, but for Constitutional error, the sentence of death would not have been imposed. Deutscher v. Whitley, supra. The Fifth Circuit test merely limits this definition to those facts which are prerequisits under state or federal law to the imposition of the death penalty. Its definition does not conflict with the Eighth and Ninth Circuits but merely limits the inquiry to all the evidence that auguably should have been presented that would implicate eligibility for the death penalty such that the jury would not have been authorized to sentence the defendant to death.

The Fifth Circuit's test is evidently applicable to Texas as well a Mississippi within the Fifth Circuit because the court refused the request herein for a rehearing and a request for a rehearing en banc. Moreover, the Fifth Circuit's test is general enough to be applicable to an individual state as well as federal requirements for the imposition of a death penalty.

Petitioner's concern that the eligibility standard cannot correct the most egregious Constitutional violation is resolved by the application of the cause and prejudice analysis used in Wainwright v. Sykes and McClesky v. Zant. The actual innocence of the death penalty was developed as an extention of a coloral showing of actual innocence which would allow a Petitioner to bypass the procedural default rule in spite of an inability to show cause and prejudice for the default. It is clear from Petitioner's examples that these most egregious Constitutional violations would satisfy the cause and prejudice analysis.

This writ of certiori should be denied since it does not present this Court any grounds for a discretionary review, expecially on a second federal habeas petition.

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IN THE

SUPREME COURT OF THE UNITED STATES

* * * * *

ROBERT WAYNE SAWYER,
PETITIONER

VERSUS

JOHN P. WHITNEY, WARDEN, LA. STATE PENITENTIARY
RESPONDENT-APPELLEE

* * * * *

MAY IT PLEASE THE COURT:

STATE OF JURISDICTION

This writ arises out of the denial of a second habeas corpus petition filed in the United States Court of Appeals for the Fifth Circuit. This Honorable Court, therefore, has jurisdiction over the instant matter under 28 U.S.C.A. §2253.

ISSUES PRESENTED

1. Whether the United States Court of Appeal for the Fifth Circuit erred in rejecting Petitioner's claims as barred under 28 U.S.C.A. § 2254 9(b).

2. Whether Petitioner's claim regarding "actual innocence of the death penalty" is procedurally barred by Rule 9(b) because the issue and it's supporting claims were addressed and rejected by the State Court and the United States District Court in his first application; and because Petitioner omitted the claim from his first habeas corpus appeal to the United States Fifth Circuit, Court of Appeal.

3. Whether Petitioner has satisfied the "cause and prejudice" standard to escape the procedural bar under McCleskey v. Zant, 11 S.Ct. 1454 (1991).

4. Whether Petitioner demonstrated a "fundamental miscarriage of justice", or "actual innocence of the death penalty", that allows him to bypass the procedural bar.

5. Whether Petitioner could overcome by the introduction of his additional alleged "facts" his qualification for the death penalty under La. R.S. 14:24,

Principals, and Tison v. Arizona, 107 S.Ct. 1676 (1987).

STATEMENT OF THE CASE

I. Course of Proceedings Below

The state acknowledges the procedural history as recited by Petitioner.

II. Statement of the Facts

The following statement of facts is essentially as found in State v. Sawyer, 422 So.2d at 97, 98 (La. 1982) and the trial transcript.

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1978, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reason behind the events that followed are difficult to discern accurately from the

record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath because nobody wanted to look [at] her "funky whory ass" that way. When she resisted defendant kicked her in the back of the head with his shoes which had taps on the ends. Ms. Shano objected, but defendant locked the front door and retained the key, threatening Ms. Shano if she interfered or ever revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, which defendant actually left the bathroom to boil while Lane kept a watch over Arwood (a period during which he may have raped Arwood). When defendant returned to the bathroom they administered additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, with both of his feet while letting out a yell, causing her head to strike either the tub or the adjacent window sill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down onto the floor. While on the floor, defendant walked on her back and Lane kicked her in the ribs. Defendant then beat her with a belt as she lay on the floor. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell

of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and set the lighter fluid afire. Lane told Shano, as he and Sawyer laughed about it, that his penis had been burned when defendant ignited the lighter fluid while he was having intercourse with the (unconscious) victim. Shano, then heard Sawyer tell Lane, "Nobody told you to stay inside of her while I told you I would show you how hot pussy can get."

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("They've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died. State v. Sawyer, supra at 97,98.

Petitioner initially pled not guilty and not guilty by reason of insanity but withdrew that plea and went to trial on a plea of not guilty with a defense of toxic psychosis. Before trial Petitioner filed a Motion To Appoint A Sanity Commission And To Order Medical Observation And

Test (R.E. A).[1] The two psychiatrists found that Petitioner was competent: That he understood the proceedings against him and that he could assist his counsel at trial. (R.E. B - Dr. De Viller's report and R.E. C - Dr. Arneson's report). Thereafter, Petitioner was found guilty of La.R.S. 14:30, First Degree Murder, and sentenced to death by a twelve person jury. He then began the appellate and post-conviction process based on the claims listed below. The aggravating factor in support of the conviction is aggravated arson; the aggravating factors in support of the death sentence are 1) engaged in perpetration of aggravated arson 2) committed in an especially heinous, atrocious or cruel manner.

Direct Appeal

Sawyer's direct appeal to the Louisiana Supreme Court addressed the following errors, although the Supreme Court reviews all errors and the sentence for excessiveness by considering if it was imposed under the influence of passion, prejudice or any other arbitrary factors:

1. Insufficient evidence to support the aggravated arson as an aggravating circumstance;
2. Insufficient evidence to support aggravated rape as an aggravating circumstance;
3. Introduction of evidence of prior conviction;
4. Introduction of prior indictment for Second Degree murder;
5. Excessive sentence because at least on aggravating circumstance not supported by the evidence.

[1]To assist the Court, the State will adopt the same abbreviations as established by petitioner: Record excerpts (R.E.__); Trial excerpts (Tr.E.__); Motion to Suppress (Mt.S.__)

Post Conviction Application

Sawyer's questions presented:

I. Violation of La. C.Cr. P. art. 512, that requires a counsel for a defendant charged with a capital offense to have been admitted to the bar for at least five years;

II. Ineffectiveness of counsel;

III. Denial of Constitutional right of Petitioner to decide whether or not to testify;

IV. Prosecutorial misconduct in the penalty phase closing argument;

V. Arbitrary factor infecting by prosecutor into jury deliberations by misleading them as to their role in imposing the death sentence;

VI. Failure of trial court to instruct that defendant is not required to testify;

VII. Trial Court's instruction at the guilt-innocence phase regarding the State's burden of proof beyond a reasonable doubt was in error;

VIII. Same as Claim VII;

IX. Trial court excused jurors who expressed only general opposition to the death penalty. (Witherspoon violation);

X. Violation of Eighth Amendment where imposition of the death sentence where one of the aggravating circumstances is not supported by the evidence;

XI. Inadmissable evidence introduced during capital sentencing hearing;

XII. Petitioner was denied a full and fair hearing in all previous state court proceedings (moot);

XIII. Death qualification of Petitioner's guilt phase jury was illegal and unconstitutional;

XIV. Comparative appellate review of Petitioner's sentence was constitutionally inadequate;

XV. Petitioner's sentence is excessive and disproportionate;

XVI. Petitioner's sentence is arbitrary and capricious;

XVII. Electrocution is a cruel and unusual means of punishment;

XVIII. Petitioner's sentence is invidiously discriminatory;

XIX. Capital Punishment is an excessive penalty;

XX. The cumulative effect of violations of Petitioner's rights is in itself a violation of Petitioner's constitutional rights.

A hearing was held in the state district court on July 12, 1985, after which these claims were denied with reasons.

Writ Of Habeas Corpus -- United States District Court

Sawyer's claims presented:

1. Improperly death qualified jury;

2. Attorney with less than 5 years violated Equal Protection and Due Process;

3. Ineffective assistance of counsel;

   a) Was admitted to practice for less than five years;

   b) Objected to the prosecutor advising the jury panel during voir dire of the penalties for lesser included offenses;

   c) Failed to object during voir dire to prosecutor's reference to evidentiary facts that were not later established at trial;

   d) Failed to conduct a meaningful voir dire;

   e) Failed to discuss with Petitioner the nature of the defense;

   f) Failed to allow Petitioner to testify during the guilt phase of the trial;

   g) Failed to adequately prepare defense witnesses for trial;

   h) Failed to call an expert that would have been able to give an opinion as to the effect of alcohol on Petitioner;

   i) Did not present a closing argument during the guilt phase of the trial;

   j) Presented an unprepared defense during the penalty phase of trial;

   k) Failed to object or move for mistrial during improper argument by prosecution during penalty phase of trial;

   l) Failed to object to erroneous instructions given the jury by the court during

guilt and penalty phase of trial; and

m) Made an inadequate closing argument during penalty phase of trial.

4. Prosecutorial misconduct at penalty phase;

5. Improper prosecutorial argument;

6. Deprivation of right to testify;

7. Failure of trial court to properly instruct jury at guilt phase of trial;

8. Unconstitutional jury instruction on burden of proof at guilt phase;

9. Unconstitutional jury instruction at guilt phase regarding specific intent;

10. Improper jury excusal;

11. Arbitrary factor introduced at sentencing phase by unsupported aggravating circumstance;

12. Inadmissible evidence at sentencing introduced arbitrary factor;

13. Petitioner's sentence is excessive and disproportionate;

14. Petitioner's sentence is arbitrary and capricious;

15. Electrocution is a cruel and unusual means of punishment;

16. Petitioner's sentence is invidiously discriminatory;

17. Capital punishment is an excessive penalty;

18. The cumulative effect of violations of Petitioner's rights is in itself a violation of Petitioner's constitutional rights.

The District court denied all of petitioner's claims with written reasons

Federal Habeas – United States Fifth Circuit

1. Attorney appointed with less than five years admission to bar violated equal protection and Due Process;

2. Ineffective assistance of counsel

a. failed to ask jurors about their attitudes towards the death penalty during

voir dire;

b. objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well the penalty for manslaughter at the guilt phase;

c. failed to object to several inadmissible, inflammatory remarks by the prosecutor;

d. produced no defense experts on the subjects of intoxication and toxic psychosis even though he had chosen them as the basis for the defense to negate the specific intent required for first degree murder;

e. failed to make closing argument at the guilt phase of trial; and

f. failed to prepare a competent penalty phase presentation.

3. Improper prosecutorial remarks at the sentencing phase under Caldwell.

After a divided panel of the U.S. Fifth Circuit denied these claims an en banc court affirmed the panel opinion.

Writ Of Certiorari To The United States Supreme Court

1. Whether Petitioner was procedurally barred from application of the rule announced in Caldwell v. Mississippi, by Teague v. Lane, 109 S.Ct. 1060 (1989) and Penry v. Lynaugh.

2. Whether Petitioner's remarks, if not barred by Teague-Penry were improper under Caldwell.

The Court determined that Petitioner's claim was procedurally barred and affirmed the conviction and sentence by opinion on June 21, 1990.

Charles Lane was tried by a different jury, found guilty of first degree murder and sentenced to life imprisonment. Charles Lane had no prior criminal history other than a DWI from the State of Florida. State v. Lane, 414 So.2d. 1223 (La. 1982). Sawyer had a prior conviction for involuntary manslaughter of a four year old child in Arkansas and was sentenced to 3 years in

prison for that crime.

SUMMARY OF ARGUMENT

The State opposes the consideration of the claim "actual innocence of the death penalty" as an abuse of the writ under 28 U.S.C.A. §2254 9(b) and McCleskey v. Zant. The claim known as "actual innocence of the death penalty" is a new label for well established jurisprudence. If the new label means that an exception is available if the federal Constitutional error alleged probably resulted in a verdict of death against one who the jury would otherwise have sentenced to life, it is basically a proportionality review that was required by Furman v. Georgia, 925 S.Ct. 2726 (1972) and Woodson v. North Carolina, 96 S.Ct. 2978 (1976). The Louisiana Supreme Court did perform a proportionality review and thoroughly discussed the aggravating and mitigating circumstances and whether the death penalty was an appropriate sentence for this particular defendant under the facts and circumstances of this crime. This issue was never presented in the first federal habeas petition and should now be barred as an abuse of the writ.

If the new label is interpreted such that defendant's claim to innocence in the sentencing context affects his legal eligibility to receive the death penalty then it is a sufficiency of evidence review under Jackson v. Virginia, 99 S.Ct. 2781 (1979). Again the Louisiana Supreme Court thoroughly reviewed the guilt and penalty phases for the sufficiency of evidence and affirmed the conviction and sentence. The issue of sufficiency of evidence was not presented on federal habeas corpus appeal and should here by procedurally barred as an abuse of the writ.

Nonetheless, if the facts are reviewed on the merits Petitioner's new information is merely supportive of prior claims or alleged facts that are based on hearsay, faded memories, and distorted information. Although the allegation incompetency was addressed at the trial level it was never reviewed by a state appellate court or the federal court. It remains a factual determination. Moreover, any application of Ake v. Oklahoma, 105 S.Ct. 2978 (1976) is barred by Teague-Penry

and Petitioner cannot avail himself of this new rule. Also the issue of incompetency to proceed at trial is barred by La.C.Cr.P. art. 930.4 as a repetitive application and was so held by the state trial court.

The claims of mental disease and neurological dysfunction without behavioral manifestations that would support these legal claims of insanity and/or incompetency add nothing new to Petitioner's facts. No new evidence of incompetency at the time of the trial has been submitted by Petitioner. The evaluations and conclusions of Petitioner's newest doctors add nothing to the determination of competency made in 1980. Moreover the jury heard the basic premises of these mental disease allegations in the form of his hospitalization, drug treatments, shock treatments, and commitments through the testimony of his sister, Ms. White.

In support of his claims Petitioner fabricates an immunity agreement for Cynthia Shano based on hearsay and an eleven year old memory. Furthermore, he misleads the court as to Wayne Shano's statements to the police as described in the police report. He also alleges a second can of lighter fluid which has never been mentioned in a prior petition. Instead Petitioner, in his prior federal court petition, talked of a silver cigarette case which was found in the trash on the day following the crime. Petitioner than tries to make a Brady issue from a letter which was written four months after the trial by an inmate acquaintance of Charles Lane to Cynthia Shano. Petitioner fabricates a claim by lifting a statement from the prosecutor's trial notes regarding an odor of alcohol on Shano and omits notifying the court that the note before that indicates that at no time was Cynthia Shano considered for prosecution. Petitioner's "facts" are not founded in reality but are presented to this Court as a distortion of the facts and Petitioner's counsel should be sanctioned under Rule 11 for misrepresenting facts to this Court.

Even if the alleged facts that Petitioner proposes would be admitted at a trial, the evidence was so overwhelming that defendant herein would still qualify for the death penalty under

Louisiana law of principals, R.S. 14:24, and under the federal jurisprudence of Tison v. Arizona, supra.

Because Petitioner failed to show cause and prejudice to escape the abuse of the writ and failed to demonstrate a miscarriage of justice such that he would be actually innocent of the death penalty his claim here should be denied as an abuse of the writ and the stay of execution vacated.

LAW AND ARGUMENT

I. **THE FIFTH CIRCUIT COURT OF APPEAL DID NOT ERR IN REJECTING PETITIONER'S CLAIMS AS BARRED UNDER RULE 9(b) BECAUSE THEY WERE ADDRESSED AND REJECTED BY THE STATE COURTS AND THE UNITED STATES FEDERAL COURTS IN SAWYER'S FIRST APPLICATIONS THERETO; AND BECAUSE HE OMITTED THE CLAIM, NOW KNOWN AS "ACTUAL INNOCENCE OF THE DEATH PENALTY", FROM HIS FIRST HABEAS CORPUS APPEAL TO THE UNITED STATES FIFTH CIRCUIT, COURT OF APPEAL.**

The State continues to oppose the consideration of the claims herein as an abuse of the writ under 28 U.S.C.A. §2254 9(b) and McCleskey v. Zant, supra. Petitioner's claim herein and the facts which support that claim were essentially reviewed and denied by the Louisiana Supreme Court on direct appeal as claims I, II, and IV, and in its sentencing review under Supreme Court Rule 12. State v. Sawyer, supra at 95 (La. 1982), reh. denied (Nov. 24, 1982). More developed issues were presented to the State District Court in the first post-conviction application as claims II, X, XI, XIV, XV, XVI, XVIII and XX. (R.E. D.) A review of Petitioner's claims presented to the Federal District Court by writ of habeas corpus reveals that he presented this claim and the facts supporting it as claim III, ineffective assistance of counsel, and claims X through XVIII. Thereafter, when Petitioner filed his appeal in the United States Fifth Circuit, he had three claims which did not include

constitutional attacks on the death penalty and only included six bases for the ineffective assistance of counsel.

The United States Supreme Court in Antone v. Dugger, 104 S.Ct. 962 (1984) (per curiam), stated that claims presented for the first time in a second federal petition constituted an abuse of the writ. That court further held that claims raised for the first time in a fourth federal habeas petition abused the writ because they "could have been raised" or "could have been developed" in the first federal habeas petition. Delo v. Stokes, 110 S.Ct. 1880 (1990). Furthermore, when a Petitioner raises grounds that are available but not relied upon in a prior petition it is an abuse of the writ. Kulhman v. Wilson, 106 S.Ct. 2616 (1986) (plurality opinion). Moreover, new arguments in a second petition that plainly could have been raised earlier constitute an abuse of the writ. Rose v. Lundy, 102 S.Ct. 1198 (1982) (plurality opinion).

Petitioner claims that he is actually innocent of the death penalty. This claim is based on alleged Constitutional errors which allegedly affected the determination of whether or not Sawyer received a sentence of death. "Actual innocence of the death penalty" could be interpreted in two ways:

1.) That after a reconsideration of the mitigating and aggravating circumstances the appropriate penalty for a particular defendant and his specific crime is life in prison instead of death;

2.) Or that because some element of the crime or all of the aggravating circumstances supporting the death penalty were not proved beyond a reasonable doubt as a matter of law, the defendant is ineligible for a sentence of death.

Although the label is new, "actual innocence of the death penalty", the concepts are not. In the first instance, when a court reviews mitigating and aggravating circumstances, the procedure

is merely a proportionality review. Such a review is performed by the Louisiana Supreme Court under its own Rule 12 and La.C.CR.P. art. 905.9[2]. A Proportionality review of mitigating and aggravating circumstances has been mandated by the United States Supreme Court since Furman v. Georgia, supra, and Woodson v. North Carolina, supra. In those cases it was determined that a death sentence had to be individualized by considering the circumstances of the offense together with the character and propensities of the offender. Because the Louisiana Supreme Court already reviewed the mitigating and aggravating circumstances and determined that this penalty was appropriate for Mr. Sawyer and his crime, and because this issue was presented to United States District Court but never fully developed, then omitted from the appeal to the United States Fifth Circuit, it is now an abuse of the writ to consider it in a second writ.

On the other hand, if the second interpretation of "actual innocence of the death penalty" is accepted then, in reality, what is performed is a sufficiency of the evidence review under Jackson v. Virginia, supra, to determine that there is sufficient evidence such that a rational trier of fact could have found beyond a reasonable doubt each and every element of the crime and the aggravating circumstances. A sufficiency of evidence review was also done by the Louisiana Supreme Court as well as presented to the United States District Court in undeveloped claims. These claims were omitted from the appeal to the United States Fifth Circuit and therefore cannot be considered now in a second habeas corpus petition as he is procedurally barred by abuse of the writ.

"Actual innocence of the death penalty" is a new label for well settled jurisprudence developed since Furman. The Louisiana Supreme Court automatically performs a proportionality

[2]La. C.Cr.P. art. 905.9 Review on Appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy Constitutional criteria for review. Added by Acts 1976, No. 694 §1.

review and a sufficiency of evidence review of all capital sentences pursuant to state law and its own Rule 12. Despite the exact meaning assigned to this new label it represents well settled jurisprudence.

Petitioner states no reasonable explanation for his failure to fully develop this claim and its factual basis in his first state post-conviction relief application and federal habeas corpus application. Nor does Petitioner explain his failure to present these claims to this court on appeal of his first federal habeas petition. If Petitioner failed to raise this claim and supporting facts on appeal in his first petition because of a deliberate choice it is an abuse of the writ. See Delo v. Stokes, supra. The Petitioner may also abuse the writ by failing to raise the claim by inexcusable neglect. McCleskey v. Zant, supra at 1468.

Regardless of Sawyer's reason for omitting the claim from his federal habeas appeal, he does not present any facts that could not have been discovered at an earlier date, nor does he present any acts which implicate that the prosecutor deliberately withheld evidence. The prior appellate counsel had access to open file discovery as did Sawyer's present counsel. What happened at the time of the federal writ is that the Caldwell issue was ripe and the appeal was trimmed to emphasize the application of Caldwell to Sawyer's trial. Such a strategy choice is not an objective factor external to the defense that impeded counsel's effort to raise the claim in state or federal court. See Murray v. Carrier, 106 S.Ct. 2639 (1986). The State has met it's burden of pleading abuse of the writ, noting with particularity and clarity Petitioner's prior writ history. Petitioner has not disproved abuse because he has failed to show cause for not raising the issues in prior applications.

A. **IF "THE ACTUAL INNOCENCE OF THE DEATH PENALTY" IS A PROPORTIONALITY REVIEW IN THE EIGHTH AMENDMENT CONTEXT, IT WAS ADDRESSED AND REJECTED BY THE LOUISIANA SUPREME COURT AND THE UNITED STATES DISTRICT COURT BUT NOT PRESENTED TO THE UNITED STATES FIFTH CIRCUIT, COURT OF APPEAL ON FIRST HABEAS WRIT.**

If the "actual innocence of the death penalty" is defined as in the Eighth Circuit's interpretation then it is basically a proportionality review in the Eighth Amendment context that reviews the mitigating and aggravating circumstances. The Eighth Circuit established that "in the penalty phase context, this exception will be available if the federal Constitutional error alleged probably resulted in a verdict of death against one who the jury would have otherwise have sentenced to life imprisonment." Stokes v. Armontrout, 893 F.2d, 152 (8th Cir. 1989).

The Louisiana Supreme Court thoroughly reviewed the penalty phase for sufficiency of evidence of statutory aggravating circumstances and maintained two of the three aggravating circumstances found by the jury: 1.) The offense was committed in an especially cruel, atrocious and heinous manner, 2.) That the offense was committed during the commission of aggravated arson. The court found that the evidence did support the existence of two aggravating circumstances. The court further reviewed the sentencing for passion, prejudice, or other arbitrary factors to decide the appropriateness of the death penalty for this particular crime and this particular murderer. The court further evaluated the sentence in terms of proportionality and excessiveness. It concluded that

> "The only thing which seemed clear from a review of the cases presented to Jefferson Parish jurors is that they appear to recommend death in relatively few cases and only in those of an egregious nature. Certainly this case fits that description. Never before has this court had presented on appeal of a death sentence with such callous indifference to human suffering as was displayed here. After administering a savage beating, defendant sat comfortably listening to records,

> while his tormented victim lay dying before his eyes. Although defendant attempted to show that Lane was the principal aggressor, the jury obviously credited Ms. Shano account which placed primary emphasis on defendant's role in Ms. Arwood's excruciatingly painful and lengthy ordeal. The jury obviously believed that he was principally responsible for urging Lane to participate in killing a woman who was virtually a perfect stranger to Lane.
>
> Moreover, the superficial disparity between the sentences imposed on Lane and on defendant quickly disappears when one evaluates the culpability of the two men in this incident, as well as their individual backgrounds. Neither of the two juries, which separately heard the cases and made the recommendations acted unreasonably. Two participants in the same murder can easily be viewed very differently for penalty purposes." State v. Sawyer, supra, at 105-106.

The state courts thoroughly reviewed Petitioner's trial and penalty phase and considered both the allegations regarding the mitigating and aggravating circumstances. The state court affirmed Petitioner's conviction and death sentence with thorough and well-developed reasons. Petitioner essentially failed to pursue a thorough review of the aggravating and mitigating circumstances of the penalty phase on federal habeas corpus. Petitioner should now be procedurally barred from presenting the claims since the supporting facts in this second federal habeas petition, which he inexcusably failed to raise in his first federal habeas appeal petition, do not support that petitioner is actually innocent of the conviction or death penalty. McCleskey v. Zant, supra. Petitioner's failure to establish cause and prejudice or a fundamental miscarriage of justice to escape this procedural bar will be developed further in this brief.

B. **IF THE "ACTUAL INNOCENCE OF THE DEATH PENALTY" IS A SUFFICIENCY OF EVIDENCE REVIEW IN THE EIGHTH AMENDMENT CONTEXT AS DEFINED BY THE ELEVENTH CIRCUIT, IT WAS ADDRESSED AND REJECTED BY THE LOUISIANA SUPREME COURT AND THE UNITED STATES DISTRICT COURT BUT NOT PRESENTED TO THE UNITED STATES FIFTH CIRCUIT, COURT OF APPEAL ON FIRST HABEAS WRIT.**

The Eleventh Circuit determined that a Petitioner may make a colorable showing that he

is actually innocent of the death penalty by presenting evidence that an alleged Constitutional error implicates all of the aggravating factors to be present by the sentencing body. That is, but for the alleged Constitutional error, the sentencing body could not have found any aggravating factors and thus Petitioner was ineligible for the death penalty. Johnson v. Singletary, (1991 WL 135998) (11th Cir. 1991). Basically the definition proposed by the 11th Circuit is a Jackson v. Virginia[3] sufficiency of evidence review of the penalty phase of the trial. In Louisiana, the class of persons eligible for the death penalty is narrowed at the definitional phase. A grand jury indictment can only be rendered for a violation of La. R.S. 14:30 if the facts of the case will initially qualify the defendant under the elements of the crime established therein. Homicides which do not qualify under R.S. 14:30 are classified as second degree murder, manslaughter, etc. In order to convict a defendant of R.S. 14:30, the state must prove beyond a reasonable doubt at least one of the aggravating circumstances listed in the definition of that crime. At the penalty phase the state is required to prove beyond a reasonable doubt one of the aggravating circumstances as listed in L.C.Cr.P. art. 905.4. But, once having been convicted of R.S. 14:30, the prosecutor need only reintroduce all the facts and evidence elicited at the guilt-innocence phase of the trial to satisfy this particular requirement. The prosecutor is free to offer any additional evidence that would support any of the other aggravating circumstances. The jury is instructed to consider "as opposed to weigh" the aggravating and mitigating circumstances to determine the appropriate sentence of life or death. La.C.C.P. art. 905.3. Thus, in Louisiana, a sufficiency of evidence review of the penalty phase would require that all aggravating circumstances that were found by the jury be reviewed. In order to find Petitioner innocent of the death penalty all aggravating circumstances found by the jury would have to be determined defective.

The Louisiana Supreme Court reviewed the death sentence as required by Supreme Court

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[3]Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979), 61 L.Ed.2d 560

Rule 28: (a) Whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and (b) Whether the sentence is proportionate to the penalty in similar cases, considering both the crime and the defendant. Additionally, the court reviewed the sufficiency of evidence of statutory aggravating circumstances because La.C.C.P. art. 905.3 requires that the jury find beyond a reasonable doubt the existence of at least one of the statutory aggravating circumstances listed in the code. After a thorough review of the trial facts and the penalty phase evidence the court affirmed Sawyer's death sentence.

The Louisiana Supreme Court again thoroughly reviewed the penalty phase at the direction of the United States Supreme Court in light of Zant v. Stephens, 103 S.Ct. 2733 (1983). Sawyer v. State, 442 So.2d 1136 (La. 1983).

The State District court in response to Petitioner's application for post-conviction relief rejected his claims after studying the records, transcripts, affidavits and stipulations.c

II. SINCE THE STATE HAS PLED ABUSE OF THE WRIT WITH CLARITY AND PARTICULARITY BY NOTING SAWYER'S PRIOR WRIT HISTORY AND IDENTIFYING THE CLAIMS THAT APPEAR FOR THE FIRST TIME AND THE CLAIMS THAT ARE REPETITIVE, THE BURDEN TO DISPROVE ABUSE UPON A SHOWING OF CAUSE AND PREJUDICE THEN BECOMES PETITIONER'S UNDER WAINWRIGHT V. SYKES.

The same cause and prejudice analysis used for procedural defaults, Wainwright v. Sykes, 97 S.Ct. 2497 (1977), was adopted for cases regarding an abuse of the writ inquiry in McClesky v. Zant, supra. In order to excuse his failure to raise the claim earlier, Petitioner must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in procedural default decisions. McClesky v. Zant, supra.

The cause standard require the Petitioner to show that some objective factor external to the defense impeded counsel's efforts to raise the claim in state court. Murray v. Carrier, supra. The

court in McClesky applied the definition of objective factors that constitute cause to address a claim in a procedural default case to claims in an abuse of the writ case: interference by officials, the factual or legal basis for a claim was not reasonably available to counsel and ineffective assistance of counsel.

Petitioner's claim herein is a mixture of a successive petition and a failure to raise the claim earlier. The claim of actual innocence of the death penalty was given only a cursory treatment by the Petitioner in his first federal habeas petition to the United States District Court. It was totally eliminated from his first habeas corpus petition to the United States Fifth Circuit. But some of the factual basis for this claim were presented to the federal courts in the form of ineffective assistance of counsel. Other constitutional attacks on the death penalty and sentencing phase were totally eliminated from the habeas petition to the Fifth Circuit except for the prosecutorial remarks at closing argument. Petitioner did address the failure to prepare a competent penalty phase and to present defense experts on the subjects of intoxication and toxic psychosis in the form of ineffective assistance of counsel. thus these claims are a mixture of successive and new claims. The claim incompetency to stand trial was never presented to the state of federal courts and represents a new claim which could have been addressed at an earlier time.

A. PETITIONER HAS NOT ESTABLISHED CAUSE TO EXCUSE HIS ABUSE OF THE WRIT BY ESTABLISHING INTERFERENCE BY OFFICIALS.

Petitioner has failed to establish a factual basis for cause for having omitted these claims from his petition. There was no cause as a result of interference by officials. The state does not have an agreement with Ms. Shano regarding her testimony. There is no allegation that the state ever impeded any investigator or defense counsel from questioning the affiant who appear herein claiming they perceived that Ms. Shano had an agreement with the state. Furthermore, there is no evidence that any state official prevented an interview with Diane Thibodeaux at an earlier time.

It is difficult to address the second can of lighter fluid since there is no evidence that there was in fact a second can of lighter fluid. Suddenly in the appeal to this court counsel has changed his allegations regarding the silver cigarette case made in the First Supplemental and Amended Petition, (p.4), into a second can of lighter fluid. The odor of alcohol (R.E. N) accusation clearly has no relevance since the testimony supported the fact that Robert Sawyer, Charles Lane and Cynthia Shano had been out drinking that night. Although Cynthia Shano testified that she did not drink, the evidence established that additional alcohol was brought back into the house when they returned from being out all night. After considering the amount of alcohol consumed it would be normal that an alcohol odor would permeate the residence. Moreover Ms. Shano was questioned at the trial about her alcohol consumption and that testimony obviates the claim herein. Furthermore, the state could not conceal before trial a letter from an inmate to Ms. Shano dated January 27, 1981, when the crime occurred in 1979 and the trial took place in September, 1980. Counsel for Petitioner on post-conviction relief had benefit of open file discovery. The letters were contained in the file and they had an opportunity to review and evaluate these letters according to the affidavit by the Assistant District Attorney William C. Credo. (R.E.K.)

In regard to the availability of the factual or legal basis for these claims, all information was available to counsel since the crime occurred except those items that have been manufactured by counsel. i.e., immunity agreement, Wayne Shano's statement, second can of lighter fluid. Sawyer has not presented facts to establish cause for his failure to investigate these claims and present them in his first petition. Moreover, counsel's proposed "facts" are a distortion of hearsay, a manipulation and manufacturing of evidence, and a presentation of half truths that have burdened the court and state.

B. MR. SAWYER WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, A DETERMINATION MADE BY ALL STATE AND FEDERAL COURTS THAT REVIEWED THIS CASE.

Ineffective assistance of counsel does provide cause for Petitioner to escape the application of abuse of the writ. Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default. Murray v. Carrier, supra at 2644-45. The issue of ineffective assistance of trial counsel has been addressed by all courts and denied. The Petitioner has never addressed a claim of ineffective assistance of appellate counsel.

Initially, Sawyer presented a litany of complaints in support of his ineffective assistance of counsel claim which included Counsel Weidner's alleged failure to present specific information regarding the 1966 hospitalization, to secure his own expert witnesses in the medical field and to properly prepare the penalty phase at trial.

In the analysis for ineffective assistance of counsel under Strickland v. Washington, 104 S.Ct. 2052 (1984), the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland requires that the defendant affirmatively prove prejudice. Id. Sawyer in this instance fails to demonstrate prejudice by the lack of specific information regarding his hospitalization in 1966, and how that information would have effected the outcome at trial. In fact, Sawyer admitted to the Pardon Board that he worked as a riverboat pilot and crew member off and on in the intervening years until the 1979 offense. Had this information been presented to the jury it would have balanced any of the alleged mental defects. This jury had information regarding Sawyer's prior behavior, his low intelligence, his sociopathic personality (whether accurate or not), his institutionalization, shock treatments, and abusive childhood. Petitioner fails to demonstrate prejudice by the failure to

introduce evidence of the commitment in 1966,[4] and the drug medication (Exhibit E).

The Fifth Circuit panel, as well as the en banc court, concluded that Sawyer had failed to affirmatively demonstrate prejudice from the allegedly deficient actions of counsel and that his ineffective assistance claim must fail. In his reasons for denying post conviction relief, the state trial judge said that Mr. Weidner's decision in not calling more than three character witnesses was probably strategy choice inasmuch as repetition tends to sound insincere. As stated by the Fifth Circuit in Larsen v. Maggio, 736 F.2d 215, 217 (5th Cir. 1984):

> representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.

The U.S. District Court and the Fifth Circuit reviewed this issue and determined that Sawyer failed to demonstrate that further mitigating evidence, which could have been merely repetitive, could have affected the jury's decision.

In regard to the alleged failure to uncover additional medical evidence to present as mitigating evidence Magistrate Ronald A. Fonseca aptly stated:

> Petitioner does not furnish us any medical reports connected with his brief stay in a mental hospital some thirteen years prior to the commission of the crime. He does not claim he was treated for or suffered from any mental condition since that earlier hospitalization. The fact that Petitioner had been hospitalized was brought out during the testimony of Petitioner's witnesses in the penalty phase of

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[4]The Certification of "was not competent to conduct his own affairs" in Petitioner's Exhibit is explained by the prognosis in the Tennessee report.

> "Guarded. Even though the patient may adjust temporarily at home under the supervision of his parents who overprotect him, he is incapable of competing in the outside world for employment. He will therefore need welfare assistance to stay at home."

The above explanation, quoted from the report, does not indicate the type of deficiency necessary for a legal argument of insanity or incompetency. Thus, the declaration that petitioner was declared incompetent in 1966, is not relevant here. In fact, we know from the Pardon Board Hearing that Sawyer went on to employment as a riverboat pilot, licensed by the Coast Guard.

the trial.

It is a clear principle that Petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition. This court clearly stated that "If what Petitioner knows or could discover upon reasonable investigation supports a claim for relief in the federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because the evidence discovered later might also have supported or strengthened the claim." Jones v. Whitley, 1991 WL 133584 (5th. Cir. 1991) at p. 7. The evaluation done by Dr. Alec Whyte adds no new information to what was known about Sawyer's behavioral problems as a teenager, his low intelligence level and medication which were before the jury. The conclusion of Dr. Orrin Devinsky that Mr. Sawyer's brain damage limits his ability to conform his conduct to acceptable behavior, and severely limits his ability to control aggression and impulses regarding his abnormal intelligence were conclusions that were heard by the jury from Dr. Arneson (Tr.R. 1441, 876) and add nothing new to Mr. Sawyer's profile.

Magistrate Fonseca's conclusion (which found that how the jury's decision could have been affected was not demonstrated) was affirmed by the Fifth Circuit panel and the en banc court. The United States Supreme Court affirmed this decision in June, 1990. Since these claims have previously been presented to the state courts on post conviction relief as well as federal habeas corpus, Petitioner's claims are repetitive under La. C.Cr.P. ar. 930.4.A. Honorable Judge Tiemann denied Petitioner's application as repetitive on october 5, 1990. (Exhibit D) The Louisiana Supreme Court denied his writ on October 7, 1990.

At the penalty phase the State put on Peter Thomas, Deputy Prosecuting Attorney for the Sixth District of Little Rock, Arkansas who introduced the indictment, conviction and commitment of Robert Sawyer for involuntary manslaughter in that state. The state then rested and Mr. Weidner put on Glenda White, sister of Robert Sawyer. Ms. White gave twelve pages of direct testimony

describing Robert Sawyer's deprived childhood, abuse by his father, his hospitalization in state mental hospitals, shock treatments, forced drug treatment, abusive treatment by the police in his town, his marriage and birth of his son, the estrangement between he and his son, and her knowledge of Robert's relationship with Cynthia Shano and her two boys. (Tr.R. 1483-1495) Ms. White also testified that she allowed Robert to babysit with her children who loved him. Ms. White emphasized the patience that Robert had with the children as she observed it. After cross examination, Mr. Weidner put on Glen Smith, Sawyer's nephew. He too testified that he never saw Robert Sawyer cruel or experienced mistreatment at Robert Sawyer's hand. He testified that Sawyer played ball with him and took him to the movies and the park.

Then Robert Sawyer himself testified and gave his account of the events that night. He also briefly described his childhood. He claimed that he did not remember the events that night but was sorry that they had happened. (Tr.R. 1508).

The five affidavits of family members merely reiterate the story of Sawyer's abusive childhood heard by the jury. Reiteration is not additional mitigation which could have changed the jury's sentence. See Burger v. Kemp, 107 S.Ct. 3114 (1987). Claim I must fail since Weidner did call family members to testify--Sawyer's sister and nephew. Five more witnesses repeating what the jury heard could not have changed its decision. Mr. Weidner's decision to put on two family members was a strategy choice. Additional family members would have done no more than duplicate the testimony of the sister and nephew. Moreover allegations regarding time spent with witnesses is not enough and was addressed by Mr. Weidner at the post conviction hearing. It is clear, however, that gravity of consultation is insufficient to warrant habeas relief. Schwander v. Blackburn, 750 F.2d at 494, 499 (5th Cir. 1984) and Sawyer v. Butler, supra.

If reviewed on the merits, this claim must fail since Weidner did present mitigating evidence at the penalty phase. Allegations that Weidner did "absolutely nothing" to prepare for the penalty

phase are exaggerated and not factually based. Counsel should be sanctioned for making unsupported allegations in his petition that are clearly refuted in the record of the penalty phase. Moreover, in reference to Weidner's representation of Sawyer, Magistrate Fonseca recognized the state judge's evaluation after hearing Weidner testify at the evidentiary hearing:

> The state trial court concluded in its assigned oral reasons that Petitioner received effective assistance of counsel. The trial judge found, "[in Mr. Weidner]...we had a mature and reasoned and in some ways seasoned certainly beyond his physical, years, for the defense of this gentleman" (R., Evidentiary Hearing, July 12, 1985, p. 187).
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> A review of the state record convinces us that Petitioner received the effective assistance of counsel in Mr. Weidner's representation.

Furthermore, in regard to the penalty phase, the appropriateness of the death penalty for this heinous crime and for this defendant with a prior homicide conviction of a four year old child is clear. Conclusionary medical statement with no factual basis that would not substantially affect Sawyer's culpability are insufficient to demonstrate that the jury's verdict of death would have been different. In particular, as the district court noted, there are no facts to support treatment for symptoms of a mental condition since the early hospitalization. The jury heard evidence of Sawyer's hospitalization, shock treatments, low average intelligence and medication at the guilt phase. Then at the penalty phase, it heard about his abusive childhood.

Because Sawyer has failed to present any "new" evidence that was not heard by the jury but merely a reiteration and expansion of what the jury did hear, this allegation does not establish cause for failure to bring these claims earlier or to readdress reviewed issues, nor prejudice that he has suffered as a result thereof and he cannot escape the application of abuse of the writ.

C. SAWYER WAS DETERMINED TO BE COMPETENT BY A LEGALLY CONSTITUTED SANITY COMMISSION AND THE TRIAL COURT SUCH THAT HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED.

In this claim, Petitioner asserts that he was incompetent to proceed to trial and that the Sanity Commission rendered an incompetent evaluation. This claim is barred by La.C.C.P. art. 930.4 as a repetitive application since the claim was raised in the trial court and was not pursued on appeal or on Federal Habeas Corpus. Petitioner has presented no new evidence of incompetency at the time of trial such that the omission of this claim on appeal or on habeas review would be excused. Judge Tiemann denied this claim as repetitive and, in the alternative, on the merits on October 5, 1991. (R.E.D.) The Louisiana Supreme Court denied Petitioner's writ on October 7, 1990.

Petitioner herein is barred from raising this claim in a successive petition which he raised on state post conviction applications and subsequent Federal Habeas Corpus writs as an abuse of the writ. 28 U.S.C.A.§2254, Rule 9(b); Sanders v. United States, 83 S.Ct. 1068 (1963); Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) (en banc). The burden rests on Petitioner to prove by a preponderance of the evidence that he has not abused the writ. Price v. Johnston, 68 S.Ct. 1049, 1063 (1948). Petitioner has failed to overcome the determination made by two psychiatrists and a trial judge in 1980, that he was competent. Attached is an affidavit from trial counsel James S. Weidner, Jr. which reinforces the conclusion of the trial court. (R.E.F.) A professional conclusion today regarding Petitioner's competency ten years ago is ludicrous at best, and reflects poorly on the integrity of the professional making such determination. Clearly, Petitioner has not carried his burden of proof to overcome a dismissal of this claim as an abuse of the writ.

In the alternative, if this Court decides to address the merits of the claim the Court must acknowledge the issue of competency was fully litigated at the hearing of the Sanity Commission.

Dr. Devillier's Report, (R.E. B) and Dr. Arneson's Report, (R.E. C). The purpose of the Sanity Commission is defined in the La.C.C.P. art. 641 et seq. as to determine whether the defendant has the mental capacity to understand the proceedings against him and to assist in his defense.

The medical information which Petitioner now claims would be pertinent to his competency determination is basically irrelevant. Dr. DeVillier in his testimony clearly stated the issue for a determination of competency is whether the defendant is able to understand at the time. The prior medical history does not become important unless the answer to the question of defendant's ability to function at the time of trial is seriously doubtful. Dr. DeVillier said, "We do a clinical interview during the time we do this clinical interview it consists of asking the individual questions and usually we get some background information. That is a history taking kind of thing which consists of what the individual's past is." "During this time, I am observing the way he approaches, the way he answers the question, the effect he shows. The way he organizes in terms of answer the question or what information he volunteers." (Tr.R. 806).

Petitioner clouds the issue of competency with the rendition of his long medical history and a diagnosis from 1966; whereas the central issue for competency is defendant's ability at the time of the trial preparation and the trial itself to understand and assist his counsel. Both trial psychiatrists performed the task that they were hired to do within the statutory mandates. Petitioner has not put forth any significant medical factors which were overlooked at the time of the trial which could have clearly affected the competency determination in 1980.

Moreover, trial counsel James Weidner has been consulted and has submitted an affidavit (R.E. F) to the effect that he did not seriously question Robert Sawyer's competency to assist him at trial. In fact, Weidner found Mr. Sawyer unusually wise as to the law and its application based on Sawyer's numerous experiences with the court system. Clearly, the failure to address the competency further was based on the fact that Mr. Sawyer at no time displayed to trial counsel,

appellate counsel or even the habeas counsel that he was unable to understand and assist them in their defense of him.

Also, Dr. Arneson indicates in her testimony that she did not consider doing a brain wave, as asked in the motion for a Sanity Commission (R.E. A), since it was not pertinent to a determination of competency. Thus it can be seen that Dr. Arneson's understanding of her role was to determine whether or not Petitioner currently could assist his counsel and understand the proceedings. The issue of further diagnosis and testing was inappropriate to determine competency. (R.E.G, Dr. Weidorn's affidavit).

The letter from Dr. Orrin Devinsky identifies that the newest EEG is normal. This supports the State's statements in its previous response that an abnormal EEG has no meaning per se, and that a normal EEG may be recorded shortly thereafter.

Dr. Devinsky identifies that there exists an abnormality in the left frontal lobe. But in the second paragraph, the doctor does not give any reason for his jump from an abnormality in the frontal lobe to the conclusion "compromise his intellectual, emotional and behavioral functions." People often suffer brain damage in the frontal lobe areas which does not manifest itself in behavioral symptoms. The conclusions leap from identification of a slight abnormality in the frontal lobe area are limiting Mr. Sawyer's abilities and behavior. Dr. Devinsky does not demonstrate that this man has any impaired cognitive, intellectual, emotional or behavioral functions that can be directly attributed to the identified abnormality.

Quite to the contrary, Mr. Sawyer admitted at the Pardon Hearing that he was a licensed riverboat pilot who had passed the strict licensing test on his fifth try. He acknowledged that the average number of times to take the test before passing was six. It was also acknowledged that the test involved computational abilities which Mr. Sawyer was able to complete on the test. The psychiatrist present at the hearing admitted that when he did his report on Sawyer's functioning

he did not know he was a licensed riverboat pilot and could find no reasonable explanation to justify his report with that new information. In a second Pardon Hearing, November 11, 1991, Mr. Sawyer retracted his claim to a pilot's license.

There is no allegation in Dr. Devinsky's new report that Mr. Sawyer has not been able to function in jail, or that he has displayed any behavioral activity to indicate impaired cognitive, intellectual or emotional functions within the past ten years.

The minor abnormality found by the MRI scan has not been linked to anything that is alleged by Petitioner. Simply stated, Petitioner has failed to allege facts to support that any cognitive, intellectual, emotional or behavioral functions are currently impaired and were impaired in 1980, that would be linked to this minor abnormality.

Although Petitioner should be procedurally barred from asserting this claim, it has no basis in fact because Petitioner has failed to assert any significant present or past medical factors or behavioral manifestations which would have affected a 1980 determination on competency. Clearly, this claim presents, at the most, support for Sawyer's early dysfunctional behavior, a fact before the jury, but nothing that bears on his "innocence" of the death penalty that would provide cause to escape the abuse of the writ. See Jones v. Whitley, supra.

Moreover, due process only requires Petitioner to have access to psychiatric assistance in two instances:

1. at the guilt phase of a trial, when defendant has demonstrated that his sanity at the time of the offense is likely to be a significant factor in determining guilt; and

2. at the penalty phase when the State presents psychiatric testimony to show aggravating factors.

See Ake v. Oklahoma, supra. Neither applies here and Sawyer is not entitled to an evidentiary hearing. Furthermore, Sawyer is asking this Court to conduct a "psychiatric medical malpractice review" in a federal habeas proceeding. The Ninth Circuit refused to do such in Harris

v. Vasquez, 901 F.2d 724, (9th Cir. 1990).

The Ninth Circuit further decided that Ake was a "new rule" of law which could not be applied retroactively to Harris under Teague v. Lane, supra at 1060. In the instant case, Sawyer's direct appeal became final in 1984. Even if he would be successful on the merits, Ake cannot be retroactively applied to Sawyer under Teague-Penry.

In Harris, supra, the Ninth Circuit further noted that Harris' claims rested on current expert opinions based on pure speculation not probative of the fundamental fairness of his trial or competency of his counsel. As here, the three new expert reports do not give data upon which their conclusions are based that would be required under Ake as probative at the guilt phase or in rebuttal to the State at the penalty phase. Absent is any data regarding Sawyer since the early test that would indicate dysfunction as mitigation.

Furthermore, this Court and the Fifth Circuit have previously reviewed Dr. Brad Fisher's affidavits in King v. Lynaugh, 868 F.2d 1400, 1406 (5th Cir. 1989):

> ... The state habeas court specifically found that Dr. Fisher's proffered affidavit lacked credibility because its conclusions concerning drug use and lack of rational capacity were extremely speculative and unsupported by objective evidence in the record."

The reports/affidavits herein suffer from the same malady and form no basis to grant an evidentiary hearing or excuse the abuse of the writ.

III. PETITIONER HAS NO ESTABLISHED A CONSTITUTIONAL CLAIM WITH A COLORABLE SHOWING OF "ACTUAL INNOCENCE OF THE DEATH PENALTY" UNDER MC CLESKY V. ZANT SUCH THAT A FUNDAMENTAL "MISCARRIAGE OF JUSTICE" WOULD RESULT FROM FAILURE TO MAINTAIN THE CLAIM.

If a Petitioner does not satisfy the cause and prejudice requirements, the federal courts may still entertain successive or abuse of the writ petitions where the prisoner supplements his Constitutional claim with a colorable showing of factual innocence. Kulhman v. Wilson, supra. The

Kulhman court quoted Judge Friendly's definition "Rather, the prisoner must show a fair probability that, in light of all evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt." Kulhman, supra at 2627, n. 17. In McClesky v. Zant, the cause and prejudice analysis was applied to an abuse of the writ through inexcusable neglect where the allegations affected the guilt-innocence phase of the trial. In that case, the court discussed the fundamental "miscarriage of justice" as applied to the claim before it because it found that McClesky could not establish cause and prejudice for omitting his claim in prior writs. In determining that McClesky did not satisfy the miscarriage of justice criteria the court said "that narrow exception is of no avail to McClesky. The Massiah violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination." McClesky v. Zant, supra at 1474. The court then concluded that the alleged Massiah violation did not cause the conviction of an innocent person.

A. ANALYSIS OF DEFINITION: ACTUAL INNOCENCE OF DEATH PENALTY

The actual innocence of the death penalty was addressed by the Fifth Circuit in Cuevas v. Collins 932 F.2d 1078 (5th Cir. 1991) where it held that Cuevas's argument that his court ordered competency evaluation were fundamentally flawed had no factual basis and did not demonstrate cause and prejudice for the omission of the claim in earlier federal habeas petitions. This court held the claim barred by the doctrine of writ abuse without defining the fundamental "miscarriage of justice" at the penalty phase of the capital trial. In Byrd v. Collins, 934 F.2d 629 (5th Cir. 1991), without defining "actual innocence", again concluded that whatever may be "extraordinary" level of Penry type evidence not given expression under the question of deliberateness and future dangerousness sufficient to render a Petitioner "actually innocence" of a sentence as opposed to

error that "might have affected [its] accuracy", it was no presented by Cuevas. It reached the same conclusion in Byrd. Byrd v. Collins, supra at 630. The Fifth Circuit again addressed the issue without defining the application of actual innocence in a capital case in Jones v. Whitly, supra.

The 8th Circuit defined the "innocence" or "miscarriage of justice" exception in the death penalty context as "in the penalty phase context, this exception will be available if the federal Constitutional error alleged probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life." Smith v. Armontrout, 888 F.2d 530, 545 (8th Cir. 1989). The 11th Circuit said that factual inaccuracy is not sufficient to demonstrate actually innocence of the death penalty in Johnson v. Singletary, supra. The court reasoned that if prejudicial factual inaccuracy alone is enough to warrant review of a defaulted claim, then the actual innocence standard is meaningless. The court tied a defendant's claim to innocence in the sentencing context to legal eligibility. The court required, "the Petitioner must show that absent the alleged Constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is ineligible for the death penalty."

Sawyer herein fails to establish a colorable showing of factual innocence of the death penalty under the 8th Circuit's definition, the 11th Circuit's definition or under his own definition. The alleged facts supporting his claims are either manufactured, based on a manipulation of the evidence, or hearsay testimony of third parties.

The Supreme Court acknowledged in Smith v. Murray, 106 S.Ct. 2661, 2668 (1986) that the concept of "Actual," as distinct from "legal," innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense. The alleged error in the Smith case was the admission of the psychiatrist's testimony at the sentencing phase of the trial. The court, in determining to uphold the procedural default principles in this case, said that the application of the cause and prejudice test would not result in a fundamental miscarriage of justice.

After reviewing the evidence the court found that the alleged Constitution error neither precluded the development of true facts nor resulted in the admission of false ones. Smith v. Murray, supra at 2668.

Despite the definition that this court may assign to "actual innocence of the death penalty", after a review of the allegations of Petitioner and the evidence developed at trial, the admissions and omissions did not serve to divert the jury deliberations concerning the ultimate question whether in fact the death penalty was the appropriate punishment for Mr. Sawyer and the facts and circumstances of this particular crime as mandated by Furman v. Georgia, supra, (1972) and Woodson v. North Carolina, supra.

In order to support a claim of actual innocence of the death penalty Sawyer alleges that James Weidner was incompetent as counsel for not interviewing the witnesses, not investigating the medical history and school records more fully, and by allowing false evidence in at the trial. To support these claims Petitioner argues that ALL probative evidence in mitigation must be before the jury. The absurdity of this standard is self evident and needs no further explanation.

B. ANALYSIS OF FACTUAL BASIS

The alleged facts that form the basis of this claim are supported by double and triple hearsay affidavits of people trying to remember events and conversations from ten years ago. The affidavits also recite a litany of complaints about and character assassinations against Cynthia Shano which do not go to the guilt or innocence of Mr. Sawyer. Sawyer, who was living with Ms. Shano at the time, would have to assume some responsibility for abuse and neglect of children living with them. Remarkably missing from Petitioner's affidavits are statements from Wayne Shano himself, Cynthia Shano herself, Detective Paul Livaudais who interviewed Wayne Shano and Phillip Boudousque, the

prosecutor in the case who would have been authorized to offer immunity to a witness in exchange for testimony. Hearsay and character assassination affidavits such as included in Petitioner's appendices could be manufactured for many other criminal cases ten years after the fact. This analysis shall address each of the Petitioner's claims:

1.) Shano's alleged agreement to testify in exchange for immunity.

2.) Wayne Shano's alleged statement to police that Mr. Sawyer did not set the victim on fire, but rather tried to stop the co-defendant, Charles Lane, from doing so.

3.) An alleged second can of lighter fluid (the one used in the murder) found in the trash can on the day following the crime which was located based on Wayne Shano's statement.

4.) The alleged fact that Detective Paul Livaudais told the prosecutor he detected an odor of alcohol on Shano at the time he arrived on the scene.

5.) The allegation that the State failed to disclose a letter received by Cynthia Shano from Charles Lane.

6.) Ms. Shano was allegedly out of the house at the time of the arson.

Number 1

As can be seen from (R.E. H), the affidavit from Phillp Boudousque, the State's prosecutor, no deal was ever offered to Cynthia Shano. Cynthia Shano Schoennagel's affidavit, (R.E. I), corroborates Mr. Boudousque's statements. And without some evidence other than hearsay affidavits, Petitioner has failed to prove this allegation.

Cynthia Shano testified at Charles Lane's trial six months prior to Sawyer's trial, in March 1980. Ms. Shano's account of Ms. Arwood's torture, rape, burning and murder is remarkably consistent in the trials, especially under the allegations of false testimony. It must also be remembered that Charles Lane and Robert Sawyer were found in the house, and that Cynthia Shano fled the house scared to death, shaking and hysterical. Charles Lane and Robert Sawyer both gave statements to the police and accused each other. Neither man accused Cynthia Shano of

participating in the crime. The physical evidence clearly established that both men participated somehow in the crime. The important question was whether one of the men was the major perpetrator. And, after a thorough investigation, the evidence, physical and oral, indicated that Robert Sawyer was the major actor in the torture and murder of Francis Arwood.

The only people who can testify as to promises that the State made would be Cynthia Shano, the prosecutor and/or anyone present at the time that the promises were made. Petitioner has failed to produce and affidavit of Cynthia Shano, the prosecutor or any witness who was present at the time an alleged promise was made. Attached is Phil Boudousque's affidavit which attests to the fact that Cynthia Shano was not only not promised anything in return for her testimony but never considered for indictment of a crime.

Ms. Shano's affidavit verifies this fact. Clearly, the testimony of Thomas Champagne, Jr. from the motions held on May 29, 1980, refute any alleged fabrication by Cynthia Shano. Thomas knocked at the door and was nearly knocked over when Cynthia came out. (Mt.S. P. 77-78) Mr. Champagne admitted that Cynthia personally told him that they kept her locked in the room so she could not get out. His testimony reveals a very shaken and upset person who did communicate to him that "Robert and Chuck beat up Fran."

Hearsay testimony of what people perceived the relationship between Cynthia Shano and the prosecutor to be is not fact and cannot be relied upon to reverse a conviction. As revealed by Shano's affidavit, counsel tried to get Cynthia Shano to recant her testimony and failed. Hearsay statements cannot be taken for the truth of the matter that they assert. This is a basic rule of evidence of which counsel should be aware.

Mr. Thomas P. Champagne, Sr., affidavit has already been addressed. The affidavit of Peter Champagne, husband of Sylvia Champagne, represents double hearsay and is totally unreliable and inadmissible as evidence at trial as counsel for Petitioner should know.

The affidavits attached by Petitioner's counsel represent hearsay statements which cannot be accepted as true. Cynthia Shano had a relationship with Sawyer and had absolutely no reason to finger him as the leader in the crime. If she intended to be devious it would be more reasonable for her to nail Charles Lane as the major actor. Simply put, the Gretna Police and the investigators had no reason to suspect that Cynthia Shano played a role in the torture, rape and death of Fran Arwood. Nor has Sawyer proposed a motive for the police and prosecutor to allegedly alter and/or conceal evidence to make Robert Sawyer the major actor over Charles Lane. It was of no consequence to the State whether Sawyer or Lane instigated the torture, burning and death of Fran Arwood.

Number 2

The affidavit from Detective Paul Livaudais, (R.E. J), who interviewed Cynthia Shano's son, Wayne, verifies what Petitioner should have read in the police report (R.E. L) that he had possession of: that Wayne Shano identified Robert Sawyer as the person who poured lighter fluid on Francis Arwood. The only person present when Livaudais questioned Wayne was Cynthia Shano according to his report. Petitioner's reliance for this accusation on the hearsay affidavit of Diane Thibodeaux instead of Wayne Shano's is unconscionable. Moreoever, this traumatic event happened over 10 years ago when Wane was four years old. since Livaudais' report was made within five days of the crime, it must be given more credibility than an affidavit of a woman who might have been present at an interview ten years ago. Neither Sawyer nor Lane implicated Cynthia Shano in the crime by their statements. Whether or not Sawyer actually fired the lighter fluid is not critical since his prints were found on the lighter fluid can indicating he participated in that part of the crime. Cynthia Shano's version of the events, consistent at both trials, must be believed. These versions include the fact that Sawyer punched, kicked, beat Fran Arwood, walked on her back and

poured scalding water on her while having the key to the front door in his pocket.

Wayne Shano' interview by the Gretna Police was given to the defense counsel in the form of the Gretna Police report. appellate and post-conviction counsel had the police report also. It does not represent exculpatory evidence, in fact, it is very damaging to Robert Sawyer although the child did not testify. His statements were damaging to Robert Sawyer but were not used since he was a four-year old child probably not competent to testify and suffering psychologically as a result of this incident.

There was no exculpatory evidence available to the State. Sergeant Livaudais' interview of the child, Wayne Shano, is documented in the Gretna Police report which was given to Betty Cole, Catherine Hancock, Wiley Beevers and Jim Weidner. Counsel Trenticosta has either failed to read the police report or has misled this court as to its contents.

Number 3

A silver cigarette case was found in the trash located outside of the home. It was listed as evidence in the police report. The silver cigarette case was never used as evidence at trial and is no longer in possession of the Clerk of court for Jefferson Parish, Louisiana. The silver cigarette case can be seen in pictures of the outside of the house. It appears that the cigarette case is sculptured which would make it difficult from which to obtain fingerprints. At no place in the police reports is there any indication that a second can of lighter fluid was ever found at the crime scene must less any evidence that would indicate that this alleged can of lighter fluid was used in the crime. Counsel for Sawyer argued the cigarette case was significant in his First Supplemental and Amended Petition filed Nov. 8, 1990, but has since changed that argument to a 2nd lighter fluid can without any factual explanation. Such whimsical conduct should be sanctioned under Rule 11.

Petitioner also fails to indicate what significance the silver cigarette case plays in the scenario. Robert Sawyer's fingerprints were found on the lighter fluid can. Even had Lane poured the fluid from the cigarette case onto Fran Arwood that alleged fact would not erase the fact that fingerprints of Robert Sawyer were found on the lighter fluid can, an indication that he probably participated in the burning of the victim. It would not negate the facts that he hit, kicked, walked on and scaled Ms. Arwood; that Sawyer had the key to the front door and could have, at any time, left the house to get help to stop Lane from doing these things to Arwood as he now claims.

Number 4

The Petitioner alleges that a document (R.E. N) found in the prosecutor's file, which appears to be questions to be asked of Detective E. J. Geiling, indicates that Cynthia Shano lied on the stand. The logic of the factual connection from alleged potential questions to be asked of a fact witness and a conclusion that another witness lied escapes Respondent. But if Petitioner's reasoning is accepted, that the notation "odor of alcohol on Cynthia Shano" is to be accepted as true, then the notation above "the odor" notation that says "describe Cynthia Shano Ever considered a suspect -- not from evidence that was collected nothing didn't really have proof one way from another." should also be accepted as true. This puts to rest any allegations that Cynthia Shano was ever a suspect and threatened with indictment thereby requiring immunity. Petitioner proposes this Court draw contradictory conclusions from one sentence of a document but ignore other sentences. Such reasoning is frivolous.

Cynthia Shano testified that she does not drink (Tr. R. 1134). Whether or not Cynthia Shano made three trips to the store to buy alcohol is no indication that she herself drinks. Furthermore, the notation "odor of alcohol on Cynthia Shano" could have been a note to establish the fact that the detective did not perceive that Cynthia Shano had been drinking. Moreover, these

notations are the work-product of the attorney from trial preparation and cannot be assumed as facts or truths. Petitioner's basis of his claim is not grounded in fact and is not a good faith argument for modification of any existing law and has been imposed for improper purposes such that he should be sanctioned under Rule 11 for unnecessary delay and increasing the cost of litigation.

Number 5

Cynthia Shano's consistent testimony in both trials is indicative of her veracity and accuracy about the events that occurred in that house which resulted in the torture, rape, burning and death of Francis Arwood. As can be seen from Cynthia Shano's testimony, Robert Sawyer was the instigator in the events. All persons involved testified that Sawyer and Shano met Charles Lane for the first time that evening in a bar. Since Cynthia Shano had a relationship with Robert Sawyer and had never known Charles Lane before that evening, there is no reasonable explanation besides the truth to support her version of the events. The letter (R.E. M) from an inmate to Cynthia Shano is dated January 27, 1981. This trial occurred in September, 1980.

Petitioner's post-conviction relief counsel, Elizabeth Cole and Catherine Hancock, had access to this file as attested to by Mr. Credo in his affidavit (R.E. K). As to the substance of this letter, it is not the sort of hearsay testimony that can be relied on. It is a letter from an inmate reflecting his interpretation of what Charles Lane allegedly told him. Cynthia Shano's testimony in both trials consistently identified Robert Sawyer as the major actor in the torture-death of Francis Arwood. How Charles Lane interpreted that testimony cannot be assigned to Cynthia Shano nor can conclusions that are ill-founded be drawn from this interpretation by another inmate. It was clear from the testimony at trial that Robert Sawyer and Cynthia Shano had a love relationship from Texas which continued here in Louisiana. It was also clear from the testimony at trial that Charles

Lane was not known by any of the neighbors, Cynthia Shano, her family nor Fran Arwood. Thomas Champagne testified that Robert Sawyer had been going out with his aunt and that he had never seen Charles Lane and did not know Lane prior to this incident. (Tr.R. 1135). Sylvia Champagne testified that she had never seen Charles Lane in her life prior to that incident. (Tr.R. 1114).

The simple truth is that Cynthia Shano told the truth at both trials despite her love relationship with Robert Sawyer. That truth happened to reduce Charles Lane's culpability which, combined with no prior crimina record, probably encouraged the jury to impose a life sentence over the death penalty. That Lane is grateful for her telling the truth is undeniable. This inclusion of a letter that was written after the trial of this matter and the accusations made against Phillip Boudousque clearly support sanctions under Rule 11. Counsel failed to tell the court about another inmate letter found in the prosecutor's file which identifies Sawyer as the major player and leader in the torturous and deadly behavior that killed Ms. Arwood. (R.E. O).

Number 6

Sawyer claims that, based on Diane Thibodeaux's affidavit, Wayne Shano said that his mother was out of the house at the time that Fran Arwood was burned. At the trial, Ms. Shano admitted to having diarrhea at the time. While she was in the bathroom she smelled something burning and asked them what it was. When she came out of the bathroom she realized that they had burned Ms. Arwood. (Tr.R. 1151). The same testimony was elicited at Charles Lanes's trial at page 319 of Cynthia Shano's testimony. Whether Ms. Thibodeaux's information is correct and Wayne Shano did not know where his mother was, it is of no consequence to the guilt or innocence of aggravated arson regarding Robert Sawyer. This is another example of counsel's manufacturing facts from hearsay and failing to direct the court to the portions of the testimony that would give a reasonable explanation for the whereabouts of Cynthia Shano at the time of the child's

perception.

IV. UNDER THE DOCTRINE OF PRINCIPALS, LA. R.S. 14:24, ROBERT SAWYER IS ELIGIBLE FOR A FIRST DEGREE MURDER CONVICTION AND SENTENCE OF DEATH DESPITE THE FACTS ALLEGED IN THIS PETITION.

In Louisiana, under La. R.S. 14:24,[5] all persons who aid and abet in the commission of a crime, whether directly or indirectly, may be charged and convicted with that crime. The doctrine of principals is limited to those crimes for which a person personally has the requisite mental state. In the case of a first degree murder conviction, the requisite mental state is that the defendant had the specific intent to kill or inflict great bodily harm. It is not enough to find merely that the accomplice had the accomplice had the necessary mental state, since this intent cannot be imputed to the accused. State v. Holmes, 388 So.2d 722 (La. 1980).

The Louisiana Supreme Court reviewed Sawyer's conviction and sentence of first degree murder for the sufficiency of evidence under the Jackson v. Virginia standards, supra. The court determined that despite the testimony of laymen and psychiatrists regarding Sawyer's allegedly intoxicated condition and its effect on his ability to form a specific intent to kill or inflict great bodily harm, the jury reasonably rejected the defense. The court found ample evidence from the testimony of the arresting officer and Ms. Shano from which a rational juror could have found defendant acted with specific intent, despite his excessive consumption of alcohol. State v. Sawyer, supra at 95 (La. 1982), reh. denied (Nov. 24, 1982). If the alleged "essential facts" that Sawyer claimed the jury should have heard were in fact before the jury, they would not have made a difference such that a sufficiency of evidence review under the Jackson standard would not survive.

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[5]La. R.S> 14:24 (Principals) - All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

The alleged immunity offer could be introduced as hearsay testimony by witnesses who could only repeat innuendo statements. The testimony of Diane Thibodeaux regarding Wayne Shano's statement Paul Livaudais would be inadmissible hearsay. The alleged second can of lighter fluid could not be introduced from the absence of facts to support its existence found in Petitioner's brief. The issue of alcohol was addressed with Cynthia Shano at trial. The alleged abuse and neglect of Shano's children would not be admissible under relevancy. The alleged acquaintance of Charles Lane and Shano before the crime would have been overbalanced by the testimony of Shano, Thomas Champagne, Jr., and detectives who verified that Charles Lane had just met Robert Sawyer that night in the lounge.

The evidence of Sawyer's organic personality syndrome with its conclusory statements not based on facts would not have balanced Dr. Arneson 's testimony regarding specific intent and Sawyer's personality. Dr. Arneson was called as a witness by the defense and in answer to an inquiry regarding Mr. Sawyer's mental condition during the crime she answered:

A.) "Mr. Sawyer had drank that much alcohol and his behavior toward victim is as described by witnesses, if his behavior is that described by a police officer who came to the house after they were called and he was simply sitting there with his feet up near the head of the victim, then it would been my opinion that he was psychotic and it was a toxic psychosis secondary to the alcohol."

Q.) "Doctor, when a person is in a toxic psychosis are they able to form intent?"

A.) "No, not in the usual sense." (Tr. R 1439)

After reviewing the evidence that Sawyer wishes to introduce and the problems that he may have introducing the evidence because of lack of factual basis, hearsay and/or relevancy, the conviction and sentence of Robert Sawyer would still survive a Jackson v. Virginia sufficiency of

evidence review.

Clearly, under Louisiana law, the evidence supported Robert Sawyer's specific intent to commit the crime based on his participation in the crime. The testimony at trial established that Robert Sawyer locked the front door and had possession of the key, that he intimidated Cynthia Shano to go to a bedroom, that he actively participated in the beating, the scalding, the burning, and the torture of Fran Arwood. This participation and failure to prevent the events support his participation in the crime such that a reasonable juror could infer from the circumstances that he had the specific intent necessary for a first degree murder conviction.

Even under the United States Supreme Court standards, a defendant may be convicted and sentenced to the death penalty for a felony that resulted in a murder when his participation is major and his mental state is one of reckless indifference. Tison v. Arizona, 107 S.Ct. 1676 (1987). The testimony in the instant case, even if the alleged essential facts proposed by Sawyer were admitted, would establish at least a reckless indifference under the federal jurisprudence which would support a conviction of first degree murder and a sentence of death.

After reviewing the Louisiana law of principals and the federal jurisprudence under Tison v. Arizona, it is clear that Robert Sawyer has not produced any alleged facts that could change his participation in the crime enough to eliminate his eligibility for a first degree murder conviction and sentence of death. Thus Sawyer has failed to establish an actual innocence of the death penalty such that a denial of his writ based on an abuse of the writ would not be a fundamental miscarriage of justice.

CONCLUSION

For the foregoing reasons, Robert Sawyer's writs should be denied based on an abuse of the writ and the stay of execution should be vacated.

Respectfully Submitted,

DOROTHY A. PENDERGAST
ASSISTANT DISTRICT ATTORNEY
COURTHOUSE ANNEX
GRETNA, LOUISIANA 70053
(504) 368-1020

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been served on Loyola Death Penalty Resourse Center and Counsel of Record by placing same in the United States mail, postage prepaid, this 13th day of November, 1991.

DOROTHY A. PENDERGAST

IN THE

SUPREME COURT OF THE UNITED STATES

* * * * *

ROBERT WAYNE SAWYER,
PETITIONER

VERSUS

JOHN P. WHITNEY, WARDEN, LA. STATE PENITENTIARY
RESPONDENT

* * * * *

STATE OF LOUISIANA'S RESPONSE IN OPPOSITION TO STAY OF EXECUTION, AND WRIT OF CERTIORARI OF SECOND WRIT OF HABEAS CORPUS

* * * * *

RECORD EXCERPTS

JOHN M. MAMOULIDES
DISTRICT ATTORNEY
24TH JUDICIAL DISTRICT
PARISH OF JEFFERSON
STATE OF LOUISIANA

DOROTHY A. PENDERGAST
BAR ROLL #9679
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RECORD EXCERPTS

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STATE OF LOUISIANA

VERSUS

ROBERT SAWYER

24th JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 79-2841

SECTION: G

FILED: _____ DEPUTY CLERK

MOTION TO APPOINT SANITY COMMISSION AND TO ORDER MEDICAL OBSERVATION AND TESTS

On the motion of the undersigned attorney for Robert Sawyer, appearing herein for the sole purpose of moving the Court to order a medical examination of the defendant and such tests are tests, including but not limited to the following: a brain scan test, which will enable medical experts to determine the lack of mental capacity or the extent of medical capacity of the defendant for the following grounds : to wit:

The defendant, Robert Sawyer, does not understand the nature of this act, nor was he aware of the difference between right and wrong and he is unable to assist his attorney in his defense.

Further there should and ought to be a sanity commission appointed in accordance with the Code of Criminal Procedure. Article 641 at sec for the purpose of a determination of the defendant's competency towards his counsel and his defense.

JAMES S. WEIDNER, JR.
TOOLEY, WALDMANN AND WEIDNER
743 Terry Parkway
Gretna, Louisiana 70053

ORDER

The foregoing motion considered, let a mental examination of the above named defendant be had forthwith, such mental examination to include such tests are are suggested by such medical experts. Further, let a sanity commission be appointed herein for the purpos

EX. A

[redacted]

A

of examining and reporting the mental conditions of the defendan including but not limited to the defendant's competence to assist counsel in his defense and defendant's sanity at the time of the alleged crime.

Let the following doctors be appointed as members to the sanity commission, to wit:

Dr. Dr Vickie;

Dr. Anson; and Dr. Frank

Dr. [redacted]

These doctors are to report to this Court on the 5th day of June, 1980, the results of their examination and the findings of their tests and give their opinions.

Gretna, Louisiana, this 23rd day of May, 1980.

JUDGE

PLEASE SERVE:

THE DISTRICT ATTORNEY FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA

ALBERT B. DEVILLIER, M.D.
8731 CHESTNUT ST.
NEW ORLEANS, LA. 70118
TELEPHONE 866-7184

June 10, 1980

The Honorable Judge Charles Gaudin
Division C
24th Judicial District Court
Parish of Jefferson
Gretna, Louisiana 70053

Re: Robert Sawyer

Dear Judge Gaudin:

The following is a psychiatric evaluation on Robert Sawyer as requested by the Courts in connections with a Lunacy Hearing to be held June 12, 1980. The subject was examined at Jefferson Parish prison on June 9, 1980.

The subject is a 29 year old white male who is originally from Memphis, Tennessee. He has been living in the New Orleans area for about 2 years with his common-law wife. He has an 8th grade education and is able to read some and write. His occupation has been working on boats as both a pilot and deckhand. He has been doing this same type of work for the last 14 years. He has never been in the armed services.

The subject states that approximately when he was 16 or 17 years old he took some type of medication for about three months. He had been hospitalized in Memphis, Tennessee. He doesn't know exactly why he was put into the hospital. While he was hospitalized he was put on medication, but he stopped taking the medication after getting out and hasn't taken any since. He denies ever having seizures or convulsions. He states that he does not abuse drugs, but he has drank heavily for a long period of time. He drinks mostly Scotch. He indicates that his drinking takes place when he is not working.

In regards to the charges, the subject indicates that he is charged with first degree murder. As he indicates "I remember bits and pieces". He stated that he had been drinking all night with his common-law wife and they had left the lounge about 4:30 in the morning. He remembers staggering into the house and the babysitter indicated to him that she had given two of the children some pills to help them sleep. With that he hit her and he indicates that is all he remembers.

B

Ex. B

Judge Charles Gaudin
Re: Robert Sawyer
June 10, 1980

MENTAL STATUS EXAMINATION: The subject is a short white male about 5'4" tall weighing 136 pounds. He has very poor dentures. He has an artificial left eye. He indicated that he lost his left eye in 1971 in a car wreck. He denies having any hallucinations or delusions and there is no evidence of any thought disorder. His memory seems to be intact and he has fairly good insight and he is cooperative.

PSYCHIATRIC IMPRESSION:

1. In my opinion the subject is legally sane in that he knows right from wrong, mentally competent in that he understands the nature of the charges against him and is able to assist counsel in his own defense.

Sincerely yours,

Albert B. DeVillier, M.D., Psychiatrist

ABD/el

Genevieve A. Arneson, M.D., F.A.P.A.
1911 FOURTH STREET
GRETNA, LA. 70053
TELEPHONE 367-4979

June 9, 1980

The Honorable Judge Charles Gaudin
Division G
24th Judicial District Court
Parish of Jefferson
Gretna, Louisiana

Re: Robert Sawyer

Dear Judge Gaudin:

Following is a psychiatric evaluation on Robert Sawyer, as requested by the Court recently in connection with a Sanity Hearing to be held June 12, 1980. The subject was examined at the Jefferson Parish prison on June 2, 1980.

The subject is a 29 year old Caucasian male resident of Gretna, Louisiana. He is originally from Memphis, Tennessee and has been in the New Orleans area since 1978. He is a widower, his wife was killed in an automobile accident in 1971. He has a 10 year old son who lives back in Tennessee. His occupation he gives as a deckhand working on the Mississippi River. He says he has an 8th grade education, left school at 14 years of age because he had to go to work. He also had a good bit of learning difficulties and was in special education classes. He states that he was hospitalized one time in a psychiatric unit and placed on lithium in 1966. He remained in the hospital for three months. He was told that he was "too active." He states that his mother committed suicide by gunshot wound when he was three months of age. He was raised by his paternal grandmother.

Subject states he has been in prison for 8 months, arrested September 18, 1979, and charged with first degree murder. He states that the individual he is alleged to have murdered did not expire until November 21, 1979. When asked about the charges the subject launched into a long detailed, overly inclusive story about the circumstances leading up to the alleged offense. He claims that he was angry at this woman who was babysitting for his girlfriend's children, after he discovered that she had been giving the children drugs. He also states that at the time of the alleged offense he was inebriated with a cheap wine called "Mad Dog 20-20." He states "that will make you crazy." He states that the events surrounding that time are known to him only in "bits and pieces."

C

Re: Charles Gaudin
June 9, 1980
Re: Robert Sawyer

MENTAL STATUS EXAMINATION: The subject presents as a small 29 year old Caucasian male. He is 5 ft. 2 in. tall, weighs 136 lbs. His appearance is marred by a facial defect in the left ocular area and a prosthetic left eye which tears frequently. He has straight black hair, hazel eyes, poor dentition, a slight degree of prognathism. Affect is rather flat as he describes tremendous events in an offhand manner. As noted, he goes into extreme detail, overly inclusive, and has difficulty reaching his goal idea. Thinking is simple and concrete. No evidence of hallucinations or gross delusions at this examination. Intelligence is estimated as low-average or borderline.

PSYCHIATRIC IMPRESSION:

1. No evidence of psychosis. No gross abnormalities in the mental status at this time.
2. Probable sociopathic personality.
3. In my opinion the subject would be considered legally sane and mentally competent to stand trial at this time.
4. From the subject's description he was intoxicated on wine at the time of the alleged offense and therefore it is probable that he has a toxic amnesia for the details of the alleged offense.
5. In the body of the motion to appoint a sanity commission it is mentioned that a brain scan test should be included which would enable medical experts to determine lack of mental capacity or the extent of mental capacity for the following grounds. It should be noted that this type of test would not give the information that is desired.

Sincerely yours,

Genevieve A. Arneson, M.D.

GAA/am

STATE OF LOUISIANA, PARISH C JEFFERSON

24th Judicial District Court

State of Louisiana

VS.

ROBERT WAYNE SAWYER

No. 79-2841

Division G

Date 10/5/90

CR: LINDA LABORDE

DISTRICT ATTORNEY DOROTHY PENDERGAST JUDGE M. JOSEPH TIEMANN

THIS MATTER APPEARED ON THE DOCKET TODAY FOR A HEARING ON THE PETITION FOR POST-CONVICTION RELIEF TO VACATE JUDGEMENT AND SENTENCE, WRIT OF HABEAUS CORPUS, AND MOTION FOR STAY OF EXECUTION AND EVIDENTIARY HEARING. PRESENT WERE: NICHOLAS TRENTICOSTA, ATTORNEY FOR THE DEFENDANT, AND DOROTHY PENDERGAST, ASSISANT DISTRICT ATTORNEY FOR THE STATE OF LOUISIANA. DEFENSE COUNSEL WAIVED THE PRESENCE OF THE DEFENDANT. THE MATTER WAS ARGUED AND SUBMITTED. THE PETITION FOR POST-CONVICTION RELIEF TO VACATE JUDGEMENT AND SENTENCE AND THE MOTION FOR STAY OF EXECUTION AND EVIDENTIARY HEARING WAS DENIED BY THE COURT. THE COURT FINDS THE MATTERS HAVE ALREADY BEEN LITIGATED AND RULED ON; IN THE ALTERNATIVE, THE COURT CONSIDERS THE CLAIMS TO BE WITHOUT MERIT. ORAL NOTICE BY THE DEFENSE TO FILE WRITS.

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE
DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, LA.

DEPUTY CLERK

EX. D

Entry No. 21

D

T. 1-98 MON 16 4 JOHN MAMOULIDE D.A. P.08

E

PRIVILEGED AND
Federal Regulations Prohibits you
further disclosure of this information

CLINICAL RECORD | NARRATIVE SUMMARY

6/16/66 | 12/23/66

Sawyer, Robert Wayne, 21,Mth

The following is a final summary on Robert Wayne Sawyer, case number 21,[illegible], 18 year old, white single male, education special classes, religion Methodist, admitted for the first time on 6-16-66 from Shelby County by RI commitment (competency removed). He has been an out-patient at Collier Clinic since February, 1966, diagnosis moderately retarded, chronic brain syndrome manifested by moderate retardation and abnormal E.E.G.

Reason for Admission: On Sunday prior to admission patient allegedly walked [illegible] of Children's toilet near a church and tried to choke her. Two years ago patient was accused of attempted rape. In February, 1966, patient went to live in Texas, to live with a paternal aunt. While in Texas he continued to run away. His aunt felt that she could not longer control his behavior and she returned him back to Memphis.

On Admission: Patient admitted attacking a 10 year old woman sexually but was not successful. He denied visual and auditory hallucinations.

Physical Examination: Non contributory. Height 5'3", Weight 123 lbs., Temperature 97.6, Blood pressure 110/90. Laboratory findings and x-ray findings within normal limits.

Course in the Hospital: He was placed on Mellaril 100 mgs. t.i.d.c., Thorazine [illegible] mgs. h.s. Patient woke his bed every night. He had full privileges. However, he began to annoy the girls on the hospital grounds and privileges were removed. He was placed on [illegible] in the Dental-Vocational Building. He began to work in the employee dining room, however, he failed to make an adequate adjustment. He talked about going home all the time. He felt that he was not in a position yet to go back to work. He showed childish behavior, lack of responsibility and he went AWOL on the day when his family came to visit him. He was discharged December 23, 1966, 30 days after his admission. During his hospital stay he received some [illegible] as well as tranquilizing drugs with little improvement in his mental attitude.

Mental Status on Day of Leave December 23, 1966:

Attitude and Behavior: He is fairly neat and clean in appearance, pays [illegible] interview and interviewer.

Stream of Mental Activity: Productions relevant, coherent, though becoming [illegible] in character.

Emotional Reactions: Emotional deterioration, inappropriate affect, childish

CLINICAL RECORD | NARRATIVE SUMMARY

Page 2

behavior, grimacing and mannerisms noted.

Thought Content: No overt psychosis. No ideas of reference, influence, or perceptions could be elicited. However he does feel that nobody likes him in school, that nobody is interested in him, even though his family visits him very often and apparently are overprotective of him.

Sensorium is clear. Orientation - oriented in all spheres. Memory is adequate both for recent and remote events. Attention and concentration fair. General information and calculation adequate and commensurated with his education. Apperception poor. Patient does not realize the degree of his psychogenic dissolution. Insight, judgment and reasoning defective.

Mental Diagnosis: 22.7 Schizophrenic reaction, childhood type

Physical Diagnosis: None apparent

Patient is incompetent. Competency removed. Patient is a minor.

Mental: Severe

Professional: Severe

Emotional: Severe

Apparently this patient failed to identify himself with parents or siblings and lack of ego strength and ego ideal is the dynamic cause of the patient's illness.

Physical Diagnosis: None apparent

Prognosis: Guarded

Even though the patient may adjust temporarily at home under the supervision of his parents the overprotect him he is incapable of competing in the outside world for any length. He will therefore need welfare assistance by State or Home.

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further Disclosure of this information

Form 4 MD - 34
REV. AUG. 61

STATE OF TENNESSEE
DEPARTMENT OF MENTAL HEALTH

CERTIFICATION OF MENTAL COMPETENCY

TO THE COUNTY COURT CLERK OF Shelby COUNTY, Tennessee

IN RE: Rogers, Robert Wayne

433-436

CERTIFICATE

In accordance with Section 33-633, Tennessee Code Annotated (Chapter 86, Public Acts 1961), I Edwin H. Levy, M. D., Superintendent of Western State Hospital for the mentally ill at Bolivar, Tennessee, do hereby certify that Robert Wayne Rogers, of Shelby County, has been a patient at this institution and was discharged as of the 28 day of December, 19 66, as a patient from this institution and in my opinion the above named person at the time of discharge was was not competent to conduct his own affairs.

Given under my hand at office as Superintendent of said hospital this 10 day of January, 19 67.

J. D. Pendelli, M. D.
Ward Physician

Max Bramwell M.D.
Superintendent

NOTE: Under Section 33-633, Tennessee Code Annotated, the Superintendent must certify his opinion as to whether the person is or is not competent to conduct his own affairs. In the event the person is competent to conduct his own affairs, the County Court Clerk should present the certificate to the County Judge or the statute is mandatory for the County Judge, without a Hearing, to enter an order on the minutes of the County Court restoring full legal rights to the person. If, in the opinion of the Superintendent, the person is not competent to conduct his own affairs, the certificate should be filed as a record in the case in the office of the County Court Clerk.

PRIVILEGED AND CONFIDENTIAL
Federal Regulations Prohibits you from making
further Disclosure of this information

STATE OF ~~SOUTH CAROLINA~~ North Carolina]
]
COUNTY OF ~~YORK~~ Mecklenburg] AFFIDAVIT
]
]
]
]
]
_____]

Before me, the undersigned Notary Public, came and appeared James S. Weidner, Jr. and after being duly sworn did depose and state:

That he was the lead trial attorney for Robert Sawyer and did represent him at his trial for First Degree Murder. That prior to commencing the trial, Robert Sawyer gave no indication of being unable to proceed to trial. Robert Sawyer answered questions put to him, seemed to understand the nature of the proceeding, acted in an appropriate manner and gave no indication of being mentally unable to proceed with the trial.

James S. Weidner, Jr.

Sworn to on this 9th
day of October, 1990

Michelle N. Mutz
Notary Public
My Commission Expires September 5, 1994

F

PARISH OF JEFFERSON
STATE OF LOUISIANA

AFFIDAVIT OF WILLIAM S. WEIDORN, M.D.

SUMMARY OF REVIEW OF MEDICAL RECORDS AVAILABLE ON ROBERT SAWYER AND OBSERVATIONS OF ROBERT SAWYER AT PARDON BOARD HEARING AT ANGOLA ON OCTOBER 8, 1990

I reviewed the medical records from Robert W. Sawyer's adolescence and hospitalizations in Tennessee. I reviewed the trial transcripts of the testimony of the Sanity Board Hearing members in 1979. And I reviewed the most recent reports of 1990 by the psychiatrist, Dr. Alec Whyte, the neurologist, Dr. Orrin Devinsky and the clinical psychologists, Brad Fisher.

In essence there are three sets of diagnoses: 1) from his adolescence and hospitalization in Tennessee, 2) from the Sanity Board Hearing, 3) the most recent set of reports by the above named consultants. In his teens, he was diagnosed as suffering from schizophrenia, childhood type. This is difficult to substantiate based upon the report of that period because the reports describe his psychological functioning in such a way that schizophrenia would not be present. Further, the most recent psychological test does not show any suggestion of schizophrenia. Therefore, it is difficult to support that diagnosis. Further, during these adolescent hospitalizations, one electroencephalogram was reported as an abnormal EEG. This is a finding and not a diagnosis and in and of itself little can be made of it.

At the time of his trial, one of the psychiatrists raised the question of his being a sociopathic personality (in current diagnostic terminology this is now termed antisocial personality). The Sanity Board at that time devoted themselves to following the mandate of the court, that is, to assess whether or not Sawyer was competent to stand trial and whether or not he was competent to understand the charges against him and assist his attorney. According to their testimony they felt that Sawyer was able to do all of those things.

Finally, the most recent consultants of 1990 reach diagnoses of Organic Personality Syndrome and Mental Retardation. In reviewing the data one can interpret the current data as being possibly suggestive of Organic Personality Syndrome. However, one could also interpret the data as being suggestive of Antisocial Personality, and in addition, one could interpret the data as being sufficient of no psychiatric disease present. Thus, it is difficult to substantiate these formal diagnoses at this point.

The question of whether or not he is mentally retarded is also a difficult one. Past and current psychological tests would suggest a degree of Mental Retardation. However, Mr. Sawyer's testimony at the Pardon Board Hearing was to the contrary in that he described himself as being a licensed riverboat pilot, he

G

described himself as functioning in this capacity for a number of years, etc.

In reading the various medical documents available on Robert Sawyer, I am not able to find descriptions of abnormal behavior or abnormal psychological functioning which would be sufficiently interfering with his ability to perform in trials, at hearings, etc. Thus, even if any one of the above listed diagnoses were accurate, and it is difficult to assess any degree of accuracy for them at this time, the question still would remain as to whether or not Robert Sawyer was able to function in his own defense and work with his attorneys in understanding the various procedures that he is involved in at this time.

In reading these reports, I am unable to find any descriptions of such limitations of his functioning regardless of the various diagnoses which have been offered over this man's lifetime.

WILLIAM S. WEIDORN, M.D.

SWORN TO AND SUBSCRIBED

BEFORE ME THIS 22ND DAY

OF OCTOBER, 1990.

NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared, Philip J. Boudousque', who after being duly sworn did depose and state:

I.

That he was the Assistant District Attorney for the Parish of Jefferson, who prosecuted Robert W. Sawyer for the murder of Francis Arwood.

II.

That after the arraignment, the State of Louisiana offered to Robert W. Sawyer, through his attorney of record, Wiley Beevers, an opportunity to plea to the crime of the first degree murder of Ms. Arwood and receive a mandatory life sentance without benefit of probation, parole or suspension of sentance.

III.

The offer made to Mr. Sawyer through his attorney was made only once and then for a period of limited duration, i.e., the amount of time it took for Mr. Beevers to convey the offer to Mr. Sawyer, thoroughly discuss the plea with his client and return with an answer to the District Attorneys Office.

IV.

That Robert W. Sawyer was only offered a plea to first degree murder with a mandatory life sentance without benefit of probation, parole or suspension of sentence because of the state's concern as to whether there was a legal basis to warrant a finding that Mr. Sawyer was engaged in an enumerated felony pursuant to La.C.C. Art. 14:30 during the course of the murder.

V.

That the District Attorney's Office for the Parish of Jefferson considered Robert W. Sawyer to be the primary

H

instigator and the most culpable participant in the Arwood murder.

VI.

That when Robert W. Sawyer declined to plea to a mandatory life sentence without benefit of probation, parole or suspension, the state never again considered a life sentence.

VII.

That at the time the above stated offer was made and subsequently rejected, the trial court had not severed the trials of Robert W. Sawyer and Charles Lane.

VIII.

That Sawyer's decision obviated the need to make a similar offer to Charles Lane.

IX.

To affiant's knowledge, information and belief, Cynthia Shano was always a cooperative witness on behalf of the state and that at no time did a representative of the District Attorney's Office ever put pressure on Ms. Shano regarding her testimony.

X.

That the affiant, as an Assistant District Attorney for the Parish of Jefferson, never considered bringing charges to a Grand Jury against Cynthia Shano regarding the Arwood murder.

PHILIP C. SCHOENEGGE

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 15th DAY
OF NOVEMBER, 1989.

NOTARY PUBLIC

Philip J. Kellogg
LOUISIANA BAR ROLL NO. 11,000

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

Before me, the undersigned authority, personally came and appeared:

CYNTHIA SCHOENNAGEL

a person of the full age of majority, who first being duly sworn did state that:

1. Prior to October 10, 1990, and since that time Nicholas Trenticosta, Sarah (last name unknown) and another female have been coming to her residence and insisting that she change her testimony in the case against Robert Sawyer, in particular to state that she had made a deal with the District Attorney's Office to avoid prosecution.

2. They have been to her residence on several occasions, often when her husband was not at home.

3. She has spoken with them on at least seven occasions and on many occasions have seen them outside of her residence and pretended not to be home.

4. On at least one occasion they have walked into her home without knocking.

5. On more than one occasion she has asked them to quit coming around her house and to quit harassing her to no avail.

6. On Wednesday, October 31, 1990, their last visit to her home they accused her of lying and told her she was being watched. The visit turned into a shouting match on her front porch causing the neighbors to come out to see what was going on.

7. As of this date there is a white car in front of her home which leaves each time she comes out. This vehicle has been in the neighborhood since the visits from Robert Sawyer's attorneys started.

8. She was never charged in connection with the murder of Frances Arwood and never cut a deal with the District Attorney's Office to avoid prosecution therewith.

9. She is currently under treatment for a heart condition, and taking medication. The harassment by these individuals is hazardous to her health.

Cynthia Schoennagel

SWORN TO AND SUBSCRIBED BEFORE ME,
NOTARY PUBLIC, FOR AND IN THE
PARISH OF JEFFERSON, THIS 15th DAY
OF November 1990.

NOTARY

I

AFFIDAVIT

PARISH OF JEFFERSON
STATE OF LOUISIANA

BEFORE ME, the undersigned authority duly commissioned and qualified, within and for the State, personally came and appeared:

PAUL E. LIVAUDAIS

who, after being duly sworn did depose and stated:

He is and has been a police officer with the City of Gretna since May 31, 1975.

He was so employed by the City of Gretna as a police detective on September 28, 1979 and was called on to investigate an aggravated battery and burning of a 23 year-old white female at 928 Porter Street; Gretna.

The investigation was begun on September 28, 1979, and was being conducted by affiant.

On September 29, 1979, affiant telephoned Cynthia Shano, mother of Wayne Joseph Shano, who was four years of age.

Mrs. Shano stated to affiant that her son, Wayne Joseph, was present throughout the beating and burning of the victim and could tell me what actually occurred.

I met with Cynthia Shano and her son Wayne Joseph Shano at 928 Porter Street Gretna, Louisiana on September 29, 1979. When this officer arrived, I briefly spoke to the mother, Cynthia Shano, then spoke to Wayne Joseph Shano. Wayne Joseph was calm and very readily stated to me that "my daddy, (Bobby) hit that girl with a hammer." I asked Wayne Joseph where was his daddy when his daddy hit the girl with the hammer and Wayne Joseph immediately led me to the northeast bedroom of the residence and showed me a blood stain where according to Wayne Joseph his daddy Bobby hit the girl with the hammer and the blood had come from the girl's mouth and face.

I then asked Wayne Joseph if he saw anything else and Wayne Joseph told me that his daddy (Bobby), threw what he used to burn

[redacted]

the girl away in the garbage bag. I was then led by Wayne Joseph to a garbage bag located in the southwest corner of the residence. This bag was full of garbage so I took the bag out to the front lawn and emptied its contents. Upon the contents falling to the ground Wayne Joseph pointed to an aluminum half of a cigarette case and stated to me that this item was used by his daddy Bobby to pour lighter fluid on the girl's body and burn her.

I then had the necessary evidence collected and left the residence.

At no time during the questioning of Wayne Joseph did Wayne Joseph implicate Mr. Lane in the beating and burning of the victim. Wayne Joseph referred to his "daddy Bobby" throughout the interview, but never was Mr. Lane mentioned. Wayne Joseph at no time told me that his daddy tried to stop Lane but only implicated his daddy Bobby (Robert Sawyer) as being the only person who beat and burned the victim Francis Arvood throughout the ordeal.

Paul E. Livaudais
PAUL E. LIVAUDAIS

Sworn To And Subscribed
Before Me this 27
day of November, 1990.

Beverly A. Pinchaud
NOTARY PUBLIC

AFFIDAVIT

PARISH OF JEFFERSON

STATE OF LOUISIANA

BEFORE ME, the undersigned authority duly commissioned and qualified, within and for the State, personally came and appeared:

WILLIAM C. CREDO, III

who, after being duly sworn did depose and state:

THAT, he was the Assistant District Attorney assigned to the original habeas writ application filed by Petitioner Robert Sawyer.

THAT, in conjunction with the original state habeas proceeding, Petitioner Robert Sawyer was represented by Catherine Hancock and Elizabeth Cole.

THAT, to the best of his memory, both Ms. Hancock and Ms. Cole had open file discovery which included a full review by them of the police reports involved in the original trial of Robert Sawyer.

THAT, to the best of his knowledge, after reviewing the file in this matter, the above statements are true and correct.

WILLIAM C. CREDO, III

Sworn To And Subscribed
Before Me this 26
day of November, 1990.

NOTARY PUBLIC

[redacted]

K

GRETNA POLICE DEPT.

SUPPLEMENT REPORT

	WILCOX, Francis	N/A	9-11-96-
928 Porter Street, Gretna, La.	9-28-79	10-3-79	
N/A	9	N/A	
RS 14:27/30 Attempt Murder		N/A	

4 living room and kitchen. The victim was then taken from the floor put on the bed in the living room, where lighter fluid was poured on her breast and down the front of her nude body and set afire.

On Saturday the 29th day of September 1979 the undersigned officer was contacted by Cynthia Shano of 918 Porter Street, Gretna, La. Cynthia Shano stated to the undersigned officer that her four year old son Wayne Joseph Shano was present through the whole incident that had occurred on 9-28-79, and could tell the undersigned officer what had occurred in his presents. The undersigned officer then met with Cynthia Shano and her four year old son Wayne Joseph Shano at approximately 4:00 P.M. at 918 Porter Street, Gretna, La. It was learned at this time that Wayne Joseph Shano's DOB was 2-15-76. The undersigned officer then questioned Wayne Joseph Shano in the presents of Cynthia Shano. According to Wayne Joseph Shano his Daddy Bobby hit that girl with a hammer. The undersigned officer then asked Wayne Joseph Shano to show the undersigned officer the location that the victim was when he observed his Daddy Bobby hit the girl with a hammer. Wayne Joseph Shano then led the undersigned officer to the North East bedroom and pointed to the bed and stated that blood was coming from the victim's mouth and face. (Note: A sample stain was taken from the mattress of this same bed and is listed as Exhibit #5). It was further learned from Wayne Joseph Shano that his daddy Bobby discarded what he used to burn the victim, in the garbage bag. The undersigned officer was then led to the utility room which is located at the South West corner of the residence and was shown a

DETECTIVE BUREAU
INTELLIGENCE
NARCOTICS
RESCUE
VICE
NONE

L

SUPPLEMENT REPORT — GRETNA POLICE DEPT.

2. COMPLAINANT / ARRESTED / VICTIM, OR OTHER: Lawson, Francis		3. ARREST NO.: N/A	4. COMPLAINT NO.: 0-[illegible]-79
5. PLACE OF OCCURRENCE: 928 Porter Street, Gretna, La.	6. ORIGINAL DATE OF OCCURRENCE: 9-28-79	7. DATE OF SUPPLEMENT: 10-3-79	
8. VALUE OF PROPERTY LOSS: N/A	9. PAGE NO.: 10	10. CORRECT OFFENSE OR INCIDENT CLASSIFICATION: N/A	11. CRIME OF: ☐ YES
12. KIND OF ELEMENT CONTINUED: ☐ OFFENSE ☐ TELEPHONE ASSESSMENT ☐ ARREST ☒ FOLLOWUP OR SUPPLEMENTAL		13. MULTIPLE CLEARANCE? ☐ YES (LIST OTHER COMPLAINT NOS. IN NARRATIVE) ☐ NO	
14. OFFENSE, CHARGE OR INCIDENT ON ORIGINAL REPORT: RS 14:27/30 Attempt Murder		15. VALUE OF PROPERTY RECOVERED: N/A	

16. INSTRUCTIONS FOR FOLLOWUP OR SUPPLEMENTAL USAGE. UNDER NARRATIVE, RECORD YOUR ACTIVITY AND ALL DEVELOPMENTS IN THE CASE SUBSEQUENT TO LAST REPORT. DETAILS AND RECORD VALUE OF ANY PROPERTY RECOVERED. NAMES AND ADDRESS NUMBERS OF ANY PERSONS ASSOCIATE CLARIFICATION CHANGE. CLEARLY SHOW DISPOSITION OF RECOVERED PROPERTY AND INVENTORY AS APPROPRIATE TO SUPERVISOR CODE STATUS AND TO PROVIDE ULR DISCOVERY. INDICATE ITEM NUMBER CONTINUED AT [illegible]

ITEM NO. 14

filled garbage bag. The undersigned officer then removed the garbage bag to the front lawn of the residence and emptied the contents. While seperating the contents the undersigned officer was shown by Wayne Joseph Shano a 1/2 part of a cigarette case, silver in color. Wayne Joseph Shano stated to the undersigned officer that this was the item used to burn the victim by his Daddy, Bobby. The undersigned officer was then shown a pair of green ladies panties by Cynthia Shano. Cynthia Shano stated to the undersigned officer that the green panties were the same panties worn by the victim prior to the victim taking a bath. It was also learned from Cynthia Shano that a third party may have been at the residence when the victim was beaten, scalded and burned. Cynthia Shano stated that it may be that the victim's X husband Jack Arwood was present. It was further learned from Cynthia Shano that the two Robert Sawyer and Charles Lane talked about taking the victim to Slidell La. and finishing her off.

After finding additional evidence at the scene the undersigned officer called for a B of I Unit. At approximately 4:51 P.M. Officer D. Deauzat of the Jefferson Parish Sheriffs Office arrived. Officer Deauzat took the necessary photographs and collected the evidence for processing. The B of I Unit left the scence at approximately 5:05 P.M.

The undersigned officer secured and left the scene at approximately 5:10 P.M.

17. REPORTING OFFICER: Det. P. E. Livaudais	NO.: 116	18. STATUS (CHECK ONE): ☐ OPEN ☐ SUSPENDED ☐ CLOSED	20. FORWARD COPY TO: ☐ DETECTIVE BUREAU ☐ INTELLIGENCE ☐ NARCOTICS ☐ RESCUE ☐ VICE ☐ NONE
19. APPROVING OFFICER	NO.	21. SUPERVISOR APPROVING	NO.

RECORDS AND IDENTIFICATION

1-21-81

Hi Cindy

I am just writing a few lines to say hello, and I hope by the time this letter get to you it will find you in the very best of health.

Just in case you are wondering how I got your address it so from a guy name Charles Lane he said you was a ~~friend~~ wonderful friend of his and you like to write to pepole

I am 5'8 weigh 132 lb. I got black hair and brown eyes and 24 years old my name is William Rausch and I like to meet new pepole and I like to make new friends.

Charles told me that you have two boys and they name is Wayne and Troy Please mail me a picture of all the of yous for I can see who I am writing to.

He also said that you look like a girl name April the one on T.V. and believe me she is a fox.

Charles told me yesterday that he was getting out soon and you and him was going back together soon. He always talk about you all the time he don't know I am writing this letter because I am in my cell.

Cindy I don't mean to come between you and Charles in anyway but I would really enjoy writing to you.

Charles said that you really helped

My Name is Leroy Murray
2020 Paine DR. Marrero La
phone 340-4516

a-2-80

To Whome Make concern
That i Was a inmate in J.P.C
11-778 - 1-19-80 With Charles lane
on 4 B L one morning We Went to
Gym and setting around and We
Were talking about our trouble What
Charles friend told me about his and
Charles case he told me how he kick
and punch the girls in her chest and
head and he told me that charles did
not do the girl Nothing but try to help
her and how Charles stops her from
drowning in bath tub and i told him
Man you much be crazy from beating
a Woman like that and told me the girls
gave his to Children sed pills and they
eyes was in the back of they head and
he try to Kill the bitch from doing that
to his Kids and said he Was drunk
him and Charles and Charles past
out and did not Know all What
happen.

2) him alot in court because he was able to say alot of what he did on the other guy and that kept him from getting the death penalty so he owe you a lot for helping him.

I hope to hear from you real soon because your letters would real mean alot to me because I don't get too many letters in here and I hope you can understand that because when you get letters in here time goes alot faster in here and with out any letters time drages along. I hope that this letter don't make you mad because it is just a friendship letter. Well I am going to let you go because I know that you got a lot to do may God bless you and may God be with you and your family

From a friend
William

P.S. Write me back soon and keep that wonderful smile

JOINT

APPENDIX

VOL. I

Supreme Court, U.S.
FILED
JAN 2 1992
OFFICE OF THE CLERK

No. 91-6382

In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE SAWYER,

Petitioner,

vs.

JOHN P. WHITLEY, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME I

NICHOLAS J. TRENTICOSTA*
R. NEAL WALKER
SARAH L. OTTINGER
210 Baronne St.
Suite 608
New Orleans, Louisiana
70112
Telephone: (504) 522-0578
Counsel for Petitioner

JOHN M. MAMOULIDES
District Attorney
24th Judicial District
Parish of Jefferson
State of Louisiana

DOROTHY PENDERGAST*
Assistant District
Attorney
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Gretna, Louisiana
70053
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Counsel for Respondent

*Counsel of Record

Petition For Certiorari Filed November 13, 1991
Certiorari Granted November 14, 1991

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OCT 18 1982

SUPREME COURT OF LOUISIANA

NO. 81-KA-1566

STATE OF LOUISIANA

versus

ROBERT SAWYER

On Appeal From the Twenty-Fourth
Judicial District Court Parish of Jefferson,
Hon. H. Charles Gaudin, Judge

LEMMON, Justice.

This is an appeal from a conviction of first degree murder and a sentence of death. The principal issue on review of the guilt phase of the trial is the sufficiency of the evidence of aggravated arson as an essential element of the offense. R.S. 14:30. The principal issues on review of the penalty phase involve (1) admission into evidence of defendant's indictment for second degree murder in an unrelated incident and his subsequent plea to involuntary manslaughter, (2) the sufficiency of the evidence supporting the aggravating circumstances found by the jury, and (3) the prosecutor's closing argument.

Facts

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children.

Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.[1]

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and

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[1] Whether Ms. Shano stayed out all night with defendant or returned home earlier during the evening was the subject of conflicting testimony. That dispute, however, is not critical to the resolution of any significant factual or legal issue in the case.

the severity of the injuries caused her to die several weeks later without ever regaining consciousness.[2]

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or ever revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists.[3] A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious.

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[2] One of the doctors described the cause of her death as "metabolic exhaustion" resulting from severe blows to her head and incredibly severe (third degree) burns over more than one-third of her body.

[3] She was probably also forced to engage in sexual intercourse with Lane during a brief period when Lane was left to guard her while defendant was boiling water in the kitchen to scald her. Although the record does not necessarily support an inference that she was raped at that point in time, this is not fatal to either the conviction or the sentence; as will be discussed later.

Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.[4]

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

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[4] Ms. Shano testified that Lane told her his sex organ had been burned when defendant ignited the lighter fluid while he was having intercourse with the (unconscious) victim. She further testified that defendant then told Lane "Nobody told you to stay inside of her while I told you I would show you how hot pussy can get".

There were also burn marks on the new sheets on the sofa bed as a result of the incident, and defendant's fingerprints were found on a can of lighter fluid.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("They've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died.

The grand jury indicted both men for first degree murder. Lane was convicted in a separate trial and sentenced to life imprisonment.[5] Defendant was convicted and sentenced to death.

Review of Guilt Phase

Defendant contends the evidence was insufficient to establish the essential elements of first degree murder.

R.S. 14:30, defining first degree murder, at the time of the offense provided in pertinent part:

> "First degree murder is the killing of a human being:

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[5] His conviction was affirmed by this court. See State v. Lane, 414 So.2d 1223 (La.1982).